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Public Service Company of New Mexico and International Brotherhood of Electrical Workers, Local Union No. 611, AFL-CIO. Cases 28-CA-022655, 28-CA-022759, 28-CA-022997, and 28-CA-023046

August 22, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA
AND MISCIMARRA

On February 17, 2012, Administrative Law Judge William L. Schmidt issued the attached decision. The Respondent filed exceptions, a supporting brief, and an answering brief to the General Counsel's exceptions. The General Counsel filed exceptions, a supporting brief, an answering brief to the Respondent's exceptions, and a reply brief to the Respondent's answering brief. The Charging Party filed exceptions and an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to adopt the judge's rulings, findings,¹ and conclusions in part, to reverse them in part, and to adopt the recommended Order as modified and set forth in full below.²

I. INTRODUCTION

The Respondent, Public Service Company of New Mexico, provides electrical power to commercial and residential customers throughout New Mexico. The Respondent has recognized the Union, Electrical Workers Local 611, as the exclusive collective-bargaining representative of employees in the following unit:

All employees of [the Respondent's] Electric, Water, Transmission, Distribution, Production, Meter Reader, and Collector departments, in the divisions and jobs

¹ The General Counsel and the Charging Party excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We shall modify the judge's recommended Order to conform to our findings and to the Board's standard remedial language and to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010). We shall substitute a new notice to conform to the modified Order and in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014).

referenced in [the Respondent's] collective-bargaining agreement with the Union effective by its terms, from May 1, 2009, through April 30, 2012.

This case involves multiple allegations that the Respondent violated Section 8(a)(5) and (1), primarily by failing to provide requested information and making unilateral changes to workplace policies. We adopt the judge's findings on the majority of those issues.³ We address the remaining Section 8(a)(5) issues below, along with the additional allegations that the Respondent violated Section 8(a)(1) by confiscating union literature from a bulletin board, and Section 8(a)(3) and (1) by removing union steward Eric Cox from a training meeting and investigating him for his conduct at the meeting.

³ Specifically, we adopt the judge's findings that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally implementing a policy limiting the Union's access to the Respondent's Electric Service Center facility in Albuquerque, New Mexico, and by failing to provide the following information: all asbestos accident investigations since 2007; all information related to the grievance involving the Respondent's use of Tom Archuleta, an employee of contractor ESSi, Inc., to displace a full-time employee; and information regarding the "other duties" besides meter reader and collector work performed by nonunit employees.

We also adopt the judge's findings that the Respondent did not violate Sec. 8(a)(5) and (1) by unilaterally requiring employees to sign a tailboard meeting form, unilaterally issuing cell phones to all linemen and implementing a new cell phone policy, failing to provide the Union with a list of all meter readers and collectors, failing to provide information related to the Respondent's alleged noncompliance with the Occupational Safety and Health Administration (OSHA) regulation requiring employers to provide personal climbing equipment to linemen, failing to reclassify nonunit operations representatives into the unit, refusing to process a related grievance on behalf of operations representative James Martinez, and refusing to provide the Union with the duties of operations representatives Martinez and Linda Hall. Regarding the duties of Martinez and Hall, we agree with the judge, for the reasons he states, that the evidence fails to show that the Union requested that information. We thus find it unnecessary to pass on the judge's additional finding that the request became moot as to Hall when the parties entered into a settlement agreement to reclassify her as a meter reader in the unit.

In addition, we agree with the judge that the Respondent did not violate Sec. 8(a)(5) and (1) by failing to provide records of bucket truck testing performed by Altec, Inc., the bucket truck manufacturer. In connection with its grievance alleging the Respondent's noncompliance with a safety manual requirement that all bucket trucks be tested quarterly, the Union requested "all bucket truck testing records." The Respondent furnished records of all tests performed by Diversified Inspections, the only subcontractor who performed bucket truck safety testing in accordance with the safety manual. Despite the Respondent's statement that Altec may have performed additional tests, the Union never specifically requested the Altec records, and no such records exist. Altec conducts only sporadic testing in the course of repairing bucket trucks and does not provide its testing results to the Respondent. Given the purpose of the Union's information request, the fact that no Altec records exist, and the Union's failure to make a specific request for such records, we find that the Respondent satisfied its obligation under the Act. We do not rely on the judge's finding that Altec's records were not relevant.

II. SECTION 8(A)(5) INFORMATION REQUEST AND UNILATERAL CHANGE ALLEGATIONS

As explained below, we reverse the judge and find that the Respondent violated the Act by failing to provide: (1) a copy of its contract with Larkin Enterprises, Inc.; (2) certain information concerning the discharges of unit employees Everand Silas and Guy Claw; and (3) information related to the Respondent's inclusion of employees on the cyber-security list. We adopt in part and reverse in part the judge's findings regarding the alleged unilateral implementation of, and failure to provide information concerning, the Respondent's "fit-test" and "clean-shaven" requirements for the use of respiratory equipment.⁴

1. The Larkin contract

The parties' collective-bargaining agreement allows the Respondent to use "supplemental employees" for 4 months at a time and specifies that their rate of pay must be consistent with that of unit employees. Contractors, including Larkin Enterprises, Inc., provide supplemental employees to the Respondent pursuant to hiring contracts. The Union, believing that Larkin employee Gerald Powell had been working for the Respondent for more than 4 months, filed a grievance in early 2009 and requested Powell's payroll records and the Respondent's contract with Larkin. The judge found that the Larkin contract is not relevant and that the payroll records, which the Respondent provided, were sufficient for the Union to determine whether the Respondent had violated the collective-bargaining agreement. We disagree.

The Respondent has a statutory obligation to provide the Union with requested information that is relevant and necessary to the Union's performance of its duties as collective-bargaining representative—including deciding whether to process grievances. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *Centura Health St. Mary-Corwin Medical Ctr.*, 360 NLRB No. 82, slip op. at 1 (2014). Here, the Larkin contract is both relevant and necessary, as it may shed light on whether the Respondent's employment of Powell beyond the 4-month limit was intentional (e.g., by providing for a period of employment exceeding the time limit) or negligent (e.g., resulting from administrative error). As the Union explained in its follow-up request to the Respondent, the contract would "allow us to see how long the Company intended to use this worker and if the Company violated the contract on purpose."

⁴ The complaint also alleges that the Respondent violated Sec. 8(a)(5) and (1) by failing to provide information concerning its investigation of union steward Cox. This allegation is discussed in Sec. IV below, along with the 8(a)(3) allegation arising from the same facts.

The dissent argues that the Respondent's intent was irrelevant to the merits of the Union's grievance because the collective-bargaining agreement proscribes the use of supplemental employees for more than 4 months regardless of intent. We disagree. If the information showed that the contract breach was unintentional, the Union might have chosen not to proceed with the grievance; it is not required to grieve every contract breach.⁵ The Union's claim that it needs the Larkin contract to determine how to proceed, despite having Powell's payroll records, is also consistent with the fact that the grievance was stuck at the second step at the time of the hearing, over 18 months after it had been filed.⁶ We therefore reverse the judge and find that the Respondent violated Section 8(a)(5) and (1) by not providing the Union with the Larkin contract.

2. Discharge memoranda and interview notes concerning employees Silas and Claw

In February 2009, Department Manager Mathew Zersen discharged mechanics Everand Silas and Guy Claw for engaging in a physical altercation, in violation of the Respondent's policy against workplace violence.⁷ Before deciding to discharge the employees, Labor Relations Manager Ginger Lynch and Supervisor Jim Cash interviewed Silas, Claw, and an employee witness. Zersen and a union steward were also present at the interviews. Zersen, Lynch, and Cash thereafter reviewed the information gathered from the investigation and determined that both employees had violated the Respondent's policy. Zersen directed Lynch to prepare discharge recommendation memoranda. After reviewing the memoranda and speaking with the legal department, Zersen decided to terminate both employees. Zersen testified that he did not take notes during the interviews or review anyone's notes prior to making his decision, and that he had no recollection of seeing Lynch's discharge memoranda.

⁵ We also disagree with the dissent's assertion that the Union did not provide a factual basis for its request for the Larkin contract. The basis was apparent from the grievance that accompanied the information request, as well as from the Union's stated explanation to the Respondent that it sought to determine if the alleged Larkin contract breach was purposeful. See *Piggly Wiggly Midwest, Inc.*, 357 NLRB 2344, 2345 (2012) ("Where the factual basis of a request for nonunit information is obvious from all the surrounding circumstances, the union's failure to spell it out will not absolve the employer of its obligations under the Act.").

⁶ The Respondent offers no support for its conclusory assertion that the Larkin contract is confidential and proprietary. See *Mission Foods*, 345 NLRB 788, 792 (2005) (employer's blanket claim of confidentiality was insufficient to relieve it of its obligation to provide the union with relevant information).

⁷ The discharges are not alleged to be unlawful.

The Union filed grievances on the employees' behalf and requested "any and all documentation that [the Respondent] used or considered . . . in determining the terminations," including the discharge memoranda and interview notes. Lynch provided her memoranda, but redacted the factual portions and replaced them with a summary of the facts as determined by Zersen, Cash, and herself after the interviews. The Respondent refused to provide the remaining information, including any interview notes, asserting that Zersen had not relied on any of the other information in deciding to discharge the employees and that the information was otherwise "confidential."

The judge found, and we agree, that the Respondent violated Section 8(a)(5) and (1) by failing to provide the Union with the unredacted copies of Lynch's discharge recommendation memoranda. The judge found, however, that the Respondent was not obligated to provide the related interview notes. The judge reasoned that a steward was present for the interviews and, moreover, that the interview notes are protected work product. Conceding that the Respondent had not asserted the work product privilege, the judge nevertheless concluded that the Respondent's confidentiality claim was "tantamount" to doing so. We disagree and find that the Respondent was obligated to provide the interview notes.

To begin, we find that the interview notes were relevant and necessary within the meaning of *Acme*, supra. The judge acknowledged that Lynch's notes "could contain her own mental impressions," which plainly are relevant to what the managers considered in deciding to discharge the employees.⁸ Although a steward was present at the interviews, management's mental impressions would not necessarily be evident to the steward. Moreover, the judge cites no case law, and we know of none, to support a finding that the steward's presence at the interviews somehow relieved the Respondent of its duty to provide the information.⁹

⁸ Mental impressions may, under certain circumstances, constitute work product. See *American Girl Place New York*, 355 NLRB 479, 486-487 (2010) (adopting ALJ's ruling that a manager's notes, containing her mental impressions and interpretations of counsel's advice, are protected work product). But, for the reasons discussed, we do not find those circumstances present here.

⁹ Our dissenting colleague would affirm the judge's dismissal of the 8(a)(5) allegation concerning the Respondent's refusal to provide Lynch's notes. He would do so without passing on the judge's rationale, but based on his view that Lynch's notes do not fall under the category of documents that Zersen "used or considered" in making the termination decisions, and therefore are not encompassed by the Union's request. Contrary to our colleague, we do not interpret Zersen's testimony that he did not "read" Lynch's notes to mean that Zersen did not otherwise use or consider her notes in making his discharge determinations. Indeed, the record shows that before making his decisions,

We turn now to the Respondent's blanket assertion of confidentiality. The party asserting confidentiality has the burden of proving that it has a legitimate and substantial confidentiality interest in the information sought and that such interest outweighs the other party's need for the information. *Howard Industries*, 360 NLRB No. 111, slip op. at 2 (2014). When a party is unable to establish confidentiality, no balancing of interests is required, and it must disclose the information in full to the requesting party. *Id.*; *Mission Foods*, supra, 345 NLRB at 791-792. Applying these principles, it is clear that Respondent's bare claim of confidentiality, without more, was insufficient to justify its refusal to provide the notes.

Furthermore, we find that the notes are not protected work product for two reasons. First, contrary to the judge, we find that the Respondent's general confidentiality claim was not tantamount to a work product claim. The judge sua sponte raised the work product privilege; the Respondent did not raise it at the hearing or in its posthearing brief. The first and only time the Respondent claimed the privilege was in its answering brief to the General Counsel's exceptions. Second, the party asserting the work product privilege bears the burden of establishing that it prepared the requested documents in anticipation of litigation. The Respondent failed to do so. It relies solely on the judge's finding that Zersen consulted with the legal department. The credited evidence, however, shows that this consultation took place *after* the interviews were conducted, which belies the Respondent's claim that Lynch took the notes with an eye toward litigation.¹⁰ *Central Telephone Co. of Texas*, 343 NLRB 987, 988 (2004). Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) by failing to provide the interview notes and Lynch's unredacted discharge recommendation memoranda.

3. Information regarding the inclusion of employees on the cyber-security list

The Respondent maintains a federally mandated personal risk assessment (PRA) program as part of its overall cyber-security policy. The PRA requires that each employee with unescorted access to the Respondent's cyber assets undergo identity verification and a 7-year

and shortly after the interviews had taken place, Zersen, Cash, and Lynch together reviewed the information gathered from the investigation, which included Lynch's notes. Further, our interpretation of the Union's information request is consistent with the Board's unanimous decision to affirm the related Sec. 8(a)(5) violation concerning the Respondent's refusal to provide Lynch's discharge memoranda, which Zersen testified he had no recollection of seeing before making his decisions.

¹⁰ For the same reasons, we reject the Respondent's argument that the judge should have found Lynch's discharge recommendation memoranda to be protected work product.

criminal background check. Employees who are deemed potential threats to cyber security or who do not qualify for access to cyber-secure areas face demotion, transfer, or termination.

During negotiations for the 2009 contract, the parties were unable to agree to changes to the cyber-security policy, and they submitted the matter to final and binding interest arbitration. Their disagreement arose from the parties' competing concerns: the Union believed that there would be significant job loss if the company had the unfettered discretion to determine which unit employees should be covered by the policy and to terminate those it determined to be potential cyber-security risks; the Respondent wanted maximum flexibility to operate its business, ensure compliance with federal regulations, and safeguard its cyber assets. In September 2009, the arbitrator issued a decision and established a cyber-security policy that recognized and attempted to "balance these competing interests." That policy became part of the parties' collective-bargaining agreement.

In early February 2010, the Respondent notified the Union that it would implement the cyber-security policy the following week. In a series of exchanges that month, the Union asked the Respondent for the names and classifications of employees designated as PRA-eligible and a "statement from [the Respondent] as to why [it] has determined each employee has a reasonable connection to Cyber Security." The Respondent provided a list of the unit employees it had designated but, regarding the reasons for its determinations, stated only that they were made in accordance with the arbitrator's decision. In a follow-up request, the Union disagreed that the Respondent's determinations were in accordance with the arbitrator's decision; it contended that the list included broad classifications of employees, most of whom only had isolated access to cyber assets. It also questioned the inclusion of one specific unit employee. The Respondent did not provide information on its selection process, maintaining that, under the arbitrator's decision, it had the discretion to make such preliminary coverage determinations.

The judge agreed with the Respondent, finding that the arbitrator's decision allows the Respondent to act unilaterally in making all preliminary determinations regarding what areas and employees are covered by the cyber-security policy. The judge noted that the arbitrator's decision allowed the Union the opportunity to grieve any adverse employment action arising from the policy, but that the Union's requests were not prompted by any adverse action. Under these circumstances, the judge concluded that the Union's requests were designed to require the Respondent to justify its coverage selections, which

is contrary to the arbitrator's decision. We disagree with the judge's finding.

The arbitrator's cyber-security policy sets forth, at a minimum, several factors the company must consider in determining employees' eligibility for and successful completion of a PRA. For example, covered employees must have a "reasonable connection to cyber security," and performance of their jobs must require "more than isolated instances" of "unescorted access to cyber assets or to cyber physical security perimeter areas." The policy also lists a minimum of six factors the company must consider in determining if an employee has successfully completed a PRA, such as the age of the information, the nature and gravity of the past conduct, and the current circumstances of the employee. Paragraph 11 of the policy provides that the Union has a contractual right to file "grievances about the *interpretation or application* of this cyber-security policy." (Emphasis added).

In light of these provisions, we find, contrary to the dissent, that the arbitrator's decision can be reasonably read to say that the Union has a contractual right under the policy to grieve not only adverse actions resulting from an employee's inclusion on the cyber-security list, but also the Respondent's initial decisions about who is included on the list.¹¹ Indeed, the arbitrator's decision does not appear to preclude the Union from knowing or challenging the basis for the Respondent's list determinations. In clarifying its need for the information, the Union aptly explained that it questioned the Respondent's inclusion of whole classifications of employees, when most on the list appeared to have only isolated access to cyber assets, and its inclusion of a specific employee who had no apparent connection to cyber security. Accordingly, the Union is entitled to the information it sought to enable it to monitor compliance with the arbitrator's decision. See *Acme*, supra, 385 U.S. 432, 435–436; *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979).

4. Respiratory "fit-testing" and the announcement of a "clean-shaven" policy

The Respondent has a Respiratory Protection Program that incorporates various OSHA regulations and includes procedures to protect employees against air contaminants and oxygen-deficient atmospheres. Under the program, employees must wear respirators in certain designated areas and may choose to wear them in other areas. If an employee is assigned to an area where respirators are required, he must undergo an annual medical evaluation and "fit test" to determine his suitability to wear the de-

¹¹ Furthermore, although the information request was not prompted by adverse action, the information the Union requested may help it identify potential adverse action and determine its next steps.

vice. Only employees who are required to wear the device must complete the evaluation and fit test. The Respiratory Protection Program does not require employees to be clean-shaven, but limits the wearing of facial hair that prevents the respirator from properly sealing to the operator's skin.

At a July 31, 2009 labor-management safety meeting, Plant Manager Jim McNichol announced that the Respondent would soon require all employees who wore a respirator (including those who did so voluntarily) to undergo a fit test. McNichol also stated that "all employees being fitted for respiratory equipment must be clean shaven." In an email sent later that day, Union Assistant Business Manager Shannon Fitzgerald claimed that McNichol's statements amounted to unilateral changes; the email requested bargaining and information regarding discipline employees would face for noncompliance with the program. The next day, McNichol sent an email to managers, but not to employees or the Union, acknowledging that he misspoke at the meeting and that there was no clean-shaven requirement.

In response to the Union's initial request regarding the clean-shaven policy, by email dated August 5, the Respondent stated only that "the fit-tests specifically prohibit any hair growth between the skin and the face piece sealing surfaces of the respirator." The Union sent four follow-up emails requesting a copy of the clean-shaven policy that McNichol "promulgated" on July 31, and in one of the emails asked that the Respondent retract McNichol's announcement if there was no such policy. In the last of these emails, the Union informed the Respondent that managers had recently required two employees to be clean shaven before undergoing the mandatory fit tests. In response, the Respondent did not confirm or deny the existence of a clean-shaven policy. It stated that it could not list all possible consequences of failing to comply with the program, but that failing the fit-test solely because the employee did not shave could result in discipline.

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) by unilaterally implementing a clean-shaven policy and refusing to provide information about the policy. The judge found that McNichol's statement at the July 31 meeting was simply an announcement that the Respiratory Protection Program would become mandatory. The judge further found, and our dissenting colleague agrees, that the Respondent never established a clean-shaven policy and therefore had no duty to provide information about a "nonexistent" policy. Accordingly, the judge dismissed both the unilateral-change allegation and the information allegation. We disagree with the judge and the dissent and find that

the Respondent violated Section 8(a)(5) and (1) in both respects.¹²

An employer must timely respond to a union's request seeking relevant information even when the employer believes it has grounds for not providing the information. *Regency Service Carts*, 345 NLRB 671, 673 (2005) ("When a union makes a request for relevant information, the employer has a duty to supply the information in a timely fashion or to adequately explain why the information will not be furnished"); *Kroger Co.*, 226 NLRB 512, 513-514 (1976). Here, the Union sent six emails to the Respondent about the clean-shaven policy, and specifically asked for a copy of the policy or for the Respondent to issue a retraction if there was no such policy. Despite the Union's repeated requests for clarification, the Respondent provided only incomplete and vague responses as to whether a policy existed; this lack of clarity was exacerbated by the Respondent's statements that an employee could be disciplined for failing to shave. In neither response did the Respondent inform the Union that there was no such policy. Indeed, while McNichol's August 1 email to managers makes clear that there was no clean-shaven policy, this retraction was not communicated to the Union or employees. Accordingly, we find that even if the Respondent did not intend to implement a clean-shaven policy, it was nevertheless obligated to respond, within a reasonable time, to the Union's information requests, even if only to confirm that the policy did not exist. See *Graymont PA, Inc.*, 364 NLRB No. 37, slip op. at 7 (2016) (employer violated Section 8(a)(5) and (1) by failing to timely inform the union that it did not possess information the union requested about the respondent's rule and policy changes). By failing to do so, the Respondent violated Section 8(a)(5) and (1).

As to the unilateral-change allegation, we observe that during the last week of August 2009, the Respondent's managers required two employees to be completely clean shaven before undergoing their fit tests. Fitzgerald also testified without contradiction that a "ton [of employees] shaved" as a result of McNichol's announcement. We therefore find that, regardless of the Respondent's intent, its conduct following McNichol's announcement resulted in a material and significant change that amounted to the

¹² The complaint also alleges that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally changing the program's fit-test policy and by refusing to provide information regarding the fit-test policy. We agree with the judge's dismissal of these allegations. The complaint does not allege that the Respondent violated the Act by making the Respiratory Protection Program applicable to and mandatory for all employees wearing a respirator, even those who had previously only worn the device by choice.

unilateral implementation of a clean-shaven requirement, in violation of Section 8(a)(5) and (1).¹³

III. SECTION 8(A)(1) CONFISCATION OF UNION LITERATURE

In mid-April 2010, union steward Cox posted copies of a *Weingarten* form on seven bulletin boards throughout the Respondent's Albuquerque facility, and distributed the forms in employees' mailboxes and in the foreman's office.¹⁴ The next morning, before the start of the shift, two employees observed Supervisor Dale Smyth rip the form from the board outside of the foreman's office and throw it away in a nearby trashcan. Cox and the Union's Assistant Business Manager Edward Tafoya approached Smyth the next day about the incident, but Smyth stated that he did not have time to discuss this "shit" and left.

The judge found that Smyth's conduct was not coercive and therefore did not violate Section 8(a)(1). The judge reasoned that the parties had a longstanding collective-bargaining relationship, the forms had otherwise been widely distributed, there was no evidence of similar incidents, and Smyth made no accompanying comments. In the judge's view, the "more reasonable" interpretation of Smyth's conduct was that he was carrying out a superior's instruction to get a copy of the form for management review.

Contrary to the judge and the dissent, we find that Smyth's conduct of ripping the *Weingarten* form from the bulletin board in the presence of two employees violated Section 8(a)(1). See, e.g., *Ozburn-Hessey Logistics, LLC*, 357 NLRB 1632, 1632, fn. 5 (2011) (employer violated Section 8(a)(1) when its supervisor confiscated and threw away prounion literature in the presence of employees).¹⁵ Moreover, as the dissent concedes, the

judge's finding that Smyth confiscated the notice to show his superior ignores the undisputed evidence that he immediately threw the notice away, and is further inconsistent with the judge's finding that the *Weingarten* forms had already been widely distributed.

IV. SECTION 8(A)(3) AND (5) ALLEGATIONS REGARDING UNION STEWARD COX

These allegations arise from union steward Cox's actions during an April 21, 2010 employee-management training meeting. As discussed further below, we agree with the judge's conclusion that the Respondent did not violate Section 8(a)(3) and (1) by removing Cox from the meeting and investigating him for his conduct at the meeting. Contrary to the judge, however, we find that the Respondent violated Section 8(a)(5) and (1) by refusing to provide information the Union requested relating to Cox's investigation.

The April 21 meeting was intended to train employees on Telestaff, a new after-hours automated call-out system through which employees would notify the Respondent of their absences. Supervisor Smyth and Manager Mary Ann Brandon led the meeting, which was attended by 14 linemen and Cox, who is not a lineman. Line Department Manager Richard Nawman requested Cox's supervisor, Mark Martinez, to release Cox so that he could attend the meeting in his capacity as steward.

During the meeting, Cox repeatedly interrupted the linemen when they attempted to ask questions: he demanded that Brandon and Smyth provide a no-layoff guarantee and accused the Respondent of engaging in direct dealing over the TeleStaff program. After the third such interruption, Smyth asked Cox to follow him to his office down the hall, where he asked Cox to leave the meeting. Cox refused, returned to the conference room where the meeting was being held, and instructed that the meeting stop and that employees leave. Smyth again asked Cox to leave; he refused and instead successfully directed the employees to leave. At this time, representatives of the Respondent and the Union arrived on the scene and discussed the matter in the hallway outside the meeting room. Meanwhile, the employees returned to the meeting room where Smyth attempted to start the meeting for the third time. Smyth's efforts failed, however, after union official Tafoya, followed by Cox, entered the room and announced that the meeting was over. Smyth asked Tafoya and Cox to leave but they refused. Shortly thereafter, Line Department Manager Nawman

¹³ In dismissing the unilateral change allegation, the judge did not, as suggested by the dissent, discredit Fitzgerald's testimony, but simply relied on his finding that there was no clean-shaven policy.

Our colleague asserts that the fact that two employees were required to be clean-shaven "does not establish that those two employees were required to shave facial hair that the OSHA standard would have permitted." We disagree. Employees had always been allowed, in accord with OSHA standards, to have facial hair as long as it did not prevent them from passing a respirator fit test. The fact that the two employees were told to be clean-shaven, *before* it could be determined whether their facial hair prevented them from passing an OSHA-required fit test, does establish that they were required to be clean shaven in accord with McNichol's announcement.

¹⁴ See generally *NLRB v. J. Weingarten*, 420 U.S. 251 (1975). The form essentially provides that the employee will waive his or her *Weingarten* right to union representation at a meeting if the Respondent agrees that nothing said or done at the meeting could be used as a basis for later discipline.

¹⁵ The dissent would dismiss this allegation, emphasizing that this was an isolated incident. In determining whether the incident is unlawfully coercive, however, the focus is not on how many times the incident occurred but on the circumstances surrounding the incident itself. We have previously found a violation under similar circumstances.

See, e.g., *Jennie-O Foods, Inc.*, 301 NLRB 305, 337 (1991) (supervisor's tearing up of union handbill in the presence of employees in a nonwork area on nonworktime violated Sec. 8(a)(1)).

announced that the meeting was being shut down and everyone disbanded.

About a week later, based on Smyth's and Brandon's complaints, the Respondent directed its in-house labor counsel, Carol Shay, to investigate whether Cox should be disciplined for his conduct at the meeting. Shay and two managers interviewed several witnesses, including some employees.

On May 5, during the investigation, Tafoya sought the following five categories of information: (1) the names of everyone interviewed; (2) a list of the allegations on which the Respondent based its investigation; (3) the names of the employees who made those allegations; (4) the interview notes from all employee interviews; and (5) the investigation report. The Union stated that it needed the information to assess whether to file a grievance alleging a violation under a contractual provision that prohibits "discriminating against stewards for the faithful performance of their duties."

By letter dated May 18, Human Resources Manager Ray Mathes notified the Union that Cox's conduct "could be considered insubordination" but that the Respondent had decided not to discipline him. The letter further stated that the Respondent had "given [the Union] notice before about [Cox's] unnecessarily antagonistic, unprofessional, and disruptive behavior during meetings" and that "[Cox] is not always entitled to such protections as he is not always acting in his capacity as a Union steward." In a separate letter dated the same day, the Respondent informed Tafoya that, in light of the decision not to discipline Cox, it did not understand how the requested information was relevant, and requested that the Union provide clarification. The letter also asserted that the requested documents were "confidential."

By letter dated May 20, the Union restated its need for the information based on its concern that "the Company continues to interfere with and retaliate against [Cox] because of the faithful performance of his duties as a steward" by investigating Cox and making "unfounded allegations" against him and other union representatives. In its June 4 letter, the Respondent maintained that the request was moot because Cox was not disciplined and because the Union already had all the information it needed, stating, "the fact of the investigation, not the manner in which the investigation was conducted . . . is actually the only basis (if any) for a grievance."¹⁶

¹⁶ In light of the Union's unfair labor practice charge filed on May 19, which alleged that the Respondent violated Sec. 8(a)(3) and (1) by removing Cox from the meeting and investigating him, the Respondent further claimed that the Union's information request on May 20 was an inappropriate attempt at discovery. The request was a renewal of the Union's original May 5 request, which was made 2 weeks before the

In a June 10 letter to the Respondent, the Union continued to assert that the Respondent was making unfounded allegations against Cox and that the Union needed the information to determine if the allegations were deliberately false. The Respondent did not respond to this letter and did not provide any of the information sought.

The complaint alleges that the Respondent violated Section 8(a)(3) and (1) by investigating Cox and removing him from the meeting and Section 8(a)(5) and (1) by refusing to provide the requested information.

1. The 8(a)(3) allegation

The judge found *Wright Line*¹⁷ inapplicable and instead applied *Burnup & Sims*,¹⁸ finding that the Respondent had a good-faith belief that Cox had engaged in misconduct at the meeting, and that the General Counsel failed to show that no unprotected conduct had occurred. The judge then applied *Atlantic Steel Co.*, 245 NLRB 814 (1979), and found that at least the first three of the four factors—the place of the conduct, the subject matter, and the nature of the outburst—weighed against finding Cox's conduct protected. He concluded that Cox's conduct at the meeting lost protection and, therefore, that the disciplinary investigation was lawful and that the Respondent had no duty to provide the requested information.

Although we adopt the judge's dismissal of the Section 8(a)(3) allegation, we clarify two points. First, we find that the proper inquiry in this case is whether Cox's conduct was so egregious as to lose the protection of the Act under *Atlantic Steel*. When, as here, an employer defends a disciplinary action based on employee misconduct that is part of the *res gestae* of the employee's protected activity, the *Atlantic Steel* test applies.¹⁹ Accordingly, neither *Wright Line* nor *Burnup & Sims* applies.

Second, in applying the *Atlantic Steel* factors, we find, contrary to the judge, that the subject matter of Cox's conduct weighs in favor of protection. Cox was express-

charge was filed. Thus, we disagree with the Respondent and the dissent that the May 20 request, which sought identical information as the original request, was an inappropriate discovery attempt.

¹⁷ 251 NLRB 1083 (1980), *enfd.* on other grounds 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), *approved in NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

¹⁸ 379 U.S. 21 (1964).

¹⁹ See *Beverly Health & Rehabilitation Services*, 346 NLRB 1319, 1322 (2006).

The judge was correct that *Wright Line* is not applicable because the Respondent's motive is not at issue; it undisputedly undertook the investigation based on Cox's conduct at the meeting. Nor is this case suited for an analysis under *Burnup & Sims*, because there is no issue as to whether Cox actually engaged in misconduct. Rather, the question is whether that misconduct was sufficiently egregious to lose the Act's protection.

ly asked to attend the meeting in his capacity as union steward. He was performing his representational duties when he asked whether the TeleStaff system would change the existing call-out procedures and whether the system would result in layoffs, and when he commented that the Respondent was attempting to directly negotiate with employees over a system that would affect employees' schedules—a term and condition of employment. Moreover, at the time of the meeting, the Telestaff system was the subject of the Union's pending unfair labor practice charge, which alleged that the Respondent had unilaterally implemented the system.²⁰

We find, however, that this factor is outweighed by the others that, as found by the judge, favor a loss of protection—in particular, the nature of Cox's conduct. Cox intentionally shut down the meeting by repeatedly interjecting his own demands and not allowing linemen to ask questions. He not only refused to leave the meeting after being told to do so three times by a manager, but reentered the conference room and demanded that the meeting end and employees leave (and, in one instance, he successfully persuaded the employees to leave). On balance, we agree with the judge's conclusion that Cox lost the protection of the Act. We also agree with the judge that the Respondent's investigation of Cox for his conduct at the meeting was not unlawful.²¹

2. The 8(a)(5) allegation

Based on two different confidentiality concerns, the judge found that the Respondent was not required to provide any information requested regarding its investigation of Cox's conduct at the April 21 training meeting. With regard to categories 1 and 3—the names of those interviewed and those who made the allegations against Cox—the judge concluded that the Union's need for the information did not outweigh the risk to employees of harassment and retaliation if they were identified.²² The judge based this finding on the nature of Cox's miscon-

duct and the fact that the request was made during the investigation. With regard to categories 4 and 5—the interview notes and investigation report—the judge found that those materials were work product. As discussed below, we reverse the judge in both instances. The Respondent failed to timely raise or to establish either of its confidentiality concerns, and thus violated Section 8(a)(5) and (1) by refusing to produce all five categories of information.

Initially, we find that all of the information is relevant to whether the Respondent's investigation was initiated and undertaken to discriminate against Cox in violation of the contract—a matter over which the Union was considering pursuing a grievance. See *Acme*, supra, 385 U.S. at 438 (providing a union with information relevant to the processing of grievances allows it to “sift out unmeritorious claims”); see also *Disneyland Park*, 350 NLRB 1256, 1257 (2007); *Transport of New Jersey*, 233 NLRB 694, 694 (1977); and *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991).²³

A determination of relevance, however, does not end the inquiry where a confidentiality concern is timely raised and established. Here, the Respondent's general assertion of confidentiality as to all five categories of information is insufficient to meet its burden in establishing a legitimate and substantial confidentiality interest.

²³ Contrary to the Respondent's contention, its decision not to discipline Cox does not preclude a finding of relevance nor render the Union's request moot. The Union followed up its original May 5 request with two more requests, each time restating the present and continuing relevance of the information so that it could investigate a possible grievance under the contract, having expressed its concern that “the Company continues to interfere with and retaliate against Steward Cox because of the faithful performance of his duties.” See e.g., *Chapin Hill at Red Bank*, 360 NLRB No. 27, slip op. at 1 (2014) (requested information has “present and continuing relevance” for union to police contractual provision allowing for use of nonunit employees to perform unit work under limited circumstances, and was not rendered moot despite resolution of grievance and backpay award to employee for violation of provision).

The Union's June 10 letter to the Respondent, in particular, articulates the present and continuing relevance of the information. In that letter, the Union cited statements made in the Respondent's May 18 letter in support of its claim that the Respondent has made and continues to make “unfounded allegations” against Cox and other union representatives because of the performance of their representative duties. For example, the Respondent's May 18 letter stated that, even though the matter was thoroughly investigated and that it had decided not to discipline Cox, his conduct, nonetheless, “could be considered insubordination.” The Respondent also stated that it had previously notified the Union about Cox's “unnecessarily antagonistic, unprofessional, and disruptive behavior during meetings” and warned that Cox “is not always entitled to such protections as he is not always acting in his capacity as [steward].” As the Union stated, the requested information was relevant to determine whether the Respondent initiated and undertook the investigation to discriminate against Cox in violation of the contract's antidiscrimination provision.

²⁰ The complaint does not contain this allegation.

²¹ Member Hirozawa joins his colleagues in adopting the judge's dismissal, but he does so on the basis that Cox was not subjected to any cognizable adverse action under Sec. 8(a)(3). Specifically, Cox was not removed from the meeting; rather, the record shows that Cox refused Smyth's three separate demands to leave the meeting and that Nawman ultimately adjourned the meeting. Furthermore, the investigation into Cox's conduct at the meeting, which spanned a little over 2 weeks, did not result in discipline. There appears to be no precedent in which an investigation under similar circumstances was found to constitute discrimination under Sec. 8(a)(3). Accordingly, because Member Hirozawa would adopt the dismissal of Sec. 8(a)(3) in the absence of adverse action, he finds it unnecessary to decide whether Cox's conduct lost the protection of the Act and what standard should govern that determination.

²² The judge did not specifically address category 2, a list of allegations on which the Respondent based its investigation.

Howard Industries, supra, 360 NLRB No. 111, slip op. at 2. For the following reasons, we also reject the judge's reliance on witness harassment concerns and the work product privilege.

Regarding the witness names, the judge raised the witness harassment concern sua sponte at the hearing, relying on the nature of Cox's misconduct and the fact that the request was made while the investigation was underway. The Respondent did not address the concern until its posthearing brief, in which it merely repeated the judge's reasoning, without citing any record evidence to show that the potential for witness harassment outweighed the Union's need for relevant information. See, e.g., *Transport of New Jersey*, supra, 233 NLRB at 695 (employer's harassment concerns were speculative and were outweighed by the union's need for the information). We are not persuaded by the dissent's assertion that the potential for harassment or retaliation against employees outweighs the Union's need for the information. The purported witness harassment concern was unsubstantiated and untimely raised, and therefore insufficient to excuse the Respondent from providing the Union with the witness names, list of allegations, and the employees who made the allegations.

The judge found that the remaining information—the interview notes and investigation report—was protected by the work product privilege—a defense the Respondent did not raise until the hearing.²⁴ Even assuming the Respondent's argument was timely, we disagree with the judge that the Respondent established that the privilege applies. The Respondent relies solely on Shay's credited testimony to support its conclusion that the Cox investigation was not routine or undertaken in the ordinary course of business, and that the notes and report were produced in anticipation of litigation. Shay testified that she directed the investigation and, at the outset, felt it was part of her duty to limit the potential damage of the pending unilateral-change charge and a potential charge that Cox threatened to file over his treatment at the meeting.

We find Shay's testimony insufficient to establish that the interview notes and investigation report are work product. The Respondent asserts that the Cox investigation was not routine, but it offered no evidence that the Cox investigation was undertaken with an eye toward litigation. *Central Telephone Co. of Texas*, supra, 343 NLRB at 989 (work-product privilege does not apply to documents produced pursuant to routine investigations but is limited to those documents specifically created in

anticipation of foreseeable litigation). Further, Shay's failure to designate the notes and report as protected at an earlier stage in the investigation undercuts the Respondent's work product claim. Nor does Cox's threat to file a charge, without more, shed light on whether the notes and report "would not have been created in substantially similar form but for the prospect of that litigation." *Id.* Based on that evidence and those considerations, we find that the Respondent did not timely assert the work product privilege, and even if it had, it did not establish that the interview notes and investigation report were created in anticipation of litigation.²⁵

ORDER

The National Labor Relations Board orders that the Respondent, Public Service Company of New Mexico, Albuquerque, New Mexico, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Refusing to bargain collectively with International Brotherhood of Electrical Workers, Local Union No. 611, AFL-CIO (the Union) by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the exclusive representative of the employees in the following appropriate unit:

All employees of the Respondent's Electric, Water, Transmission, Distribution, Production, Meter Reader, and Collector departments in the divisions and jobs referenced in the Respondent's collective-bargaining

²⁴ See Sec. II.2, supra, for a discussion of Board precedent governing work product.

²⁵ Our dissenting colleague would affirm the judge's dismissal of this allegation. In addition to the reasons stated by the judge, he would find the Respondent's denial of the Union's request lawful on the basis that the request was both an inappropriate attempt at discovery (which we have addressed at fn. 16, above) and premature. We disagree that the information request was premature. As we have concluded, the requested information was relevant and necessary to determine whether the Union would pursue a grievance under the collective-bargaining agreement's antidiscrimination policy. The request was made after the Respondent's investigation of Cox, undertaken by its in-house counsel, was well underway. Moreover, the record shows, and the Respondent's letter confirms, that similar incidents had occurred where management had accused Cox of misconduct in the performance of his steward duties. Given this context, the Union's request was not premature, but an effort to ensure that the investigation was not based on unfounded allegations or used to retaliate against Cox in violation of the antidiscrimination clause. Further, we find the cases the dissent relies upon to be distinguishable. See *General Electric Co. v. NLRB*, 916 F.2d 1163 (7th Cir. 1990) (court held that union's demand for subcontracting cost data, which was made over a year before contract negotiations could begin, was premature); and *Tri-State Generation & Transmission Assn.*, 332 NLRB 910, 911 (2000) (without passing on merits of union's prospective accretion claim, Board held that information request was premature as employer was, at the time, only in early discussions about a possible merger).

agreement with the Union effective by its terms from May 1, 2009, through April 30, 2012.

(b) Failing and refusing to respond in a timely manner to information requests made by the Union.

(c) Unilaterally changing terms and conditions of employment of its employees in the above unit.

(d) Confiscating Union literature from the bulletin board.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Furnish to the Union in a timely manner the following information it previously requested, which is necessary and relevant to the performance of its representative functions: (1) all asbestos accident investigations since 2007; (2) all information related to the grievance involving the Respondent's use of Tom Archuleta, an employee of contractor ESSI, Inc.; (3) all information regarding the "other duties" besides meter reader and collector work performed by nonunit employees; (4) the Respondent's contract with Larkin Enterprises, Inc.; (5) unredacted copies of the discharge recommendation memoranda and the interview notes as related to employees Everand Silas and Guy Claw; (6) a copy of its clean-shaven policy or, if there is none, a statement stating that such policy does not exist; (7) all information requested relating to the Respondent's inclusion of employees on the cybersecurity list; and (8) all information requested related to the disciplinary investigation of union steward Eric Cox.

(b) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit.

(c) Rescind the change to the policy for the access of Union agents to the Respondent's Electric Service Center facility in Albuquerque, New Mexico, that was unilaterally implemented in January 2009. Restore the Union agents' access rights to the Respondent's Electric Service Center facility in Albuquerque, New Mexico, to that which existed from January until August 2009, or in the event the Respondent has generally altered its access procedures, provide the union agents with a form of access substantially equivalent to that which existed between January and August 2009.

(d) Rescind the clean-shaven policy that was unilaterally implemented on July 31, 2009.

(e) Within 14 days after service by the Region, post at all of Respondent's facilities in New Mexico copies of

the attached notice marked "Appendix".²⁶ Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 31, 2009.

(f) Within 21 days after service by the Region, file with the Regional Director of Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 22, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part.

I agree with the majority on most of the issues in this case. As to seven specific issues, however, my colleagues and I disagree. On each of these issues, my colleagues reverse the judge's decision and find the unfair labor practice violation. For the reasons explained be-

²⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

low, I would affirm the judge's decision and dismiss each of these allegations.

I. Alleged 8(a)(1) Removal of Union Notice from Bulletin Board

I agree with the judge that the Respondent did not violate Section 8(a)(1) of the National Labor Relations Act (NLRA or Act) by its isolated act of removing a single union notice from a bulletin board and throwing it away. The notice in question gave employees information and advice about their *Weingarten*¹ rights. Two working foremen in the bargaining unit saw a supervisor remove and discard the notice. The supervisor said nothing as he did so and made no sounds or evocative gestures. The Union quickly replaced the notice, and it remained untouched thereafter. The Union posted six more copies of the notice on other bulletin boards. None was disturbed. Further, many employees received copies in their Respondent-provided mailboxes, and there were numerous copies available to employees on desks in the same office that housed the bulletin board from which the notice was removed. There is no evidence that any of those copies were disturbed.

The judge found that the supervisor removed the notice from the bulletin board to give to a manager for review. I agree with my colleagues that this finding is contradicted by evidence that the supervisor removed the notice and then immediately threw it away. Nonetheless, I would dismiss the allegation. As noted above, only two employees saw the notice being removed, the notice was promptly replaced and went untouched thereafter, there were no fewer than six other copies posted on the Respondent's bulletin boards, many copies were distributed to employees in their mailboxes, and numerous other copies were available to employees at various plant locations, including a manager's office. Aside from one, isolated instance, the Respondent openly cooperated with the Union's efforts to make the notice available to employees. This brief event involved only two employees, nothing was said, and there were no hostile or angry gestures. These circumstances bear little resemblance to those in *Jennie-O Foods, Inc.*, 301 NLRB 305, 337 (1991), on which the majority relies, where a supervisor tore up a union handbill in the presence of more than 30 employees, and the supervisor and an employee engaged in a hostile verbal exchange. Given the circumstances here, I believe it strains credulity to find that this incident would have reasonably interfered with, restrained, or coerced employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act. See, e.g., *NLRB v. Motorola, Inc.*, 991 F.2d 278, 283 (5th Cir.

1993) (in refusing to enforce Board's order, noting that "federal courts have consistently held that marginal infringements do not violate the Act"); *NLRB v. First National Bank of Pueblo*, 623 F.2d 686, 688, 692 (10th Cir. 1980) (court agrees with administrative law judge's dismissal of Section 8(a)(1) allegation involving a "transient incident that had no meaningful impact"); *Yellow Ambulance Service*, 342 NLRB 804, 810 (2004) ("[A] Board remedy for de minimis misconduct is unwarranted."); *Phillips Industrial Components, Inc.*, 216 NLRB 885, 885 (1975) (reversing administrative law judge and dismissing 8(a)(1) allegation where one instance of a supervisor issuing an overbroad no-solicitation directive was promptly retracted).

II. Alleged 8(a)(5) Unilateral Implementation of "Clean-Shaven" Policy

I disagree with my colleagues' finding that the Respondent unilaterally changed its Respiratory Protection Program in violation of Section 8(a)(5) of the Act. The General Counsel, whose burden it was to establish the violation he had alleged, failed to establish that the Respiratory Protection Program was changed.

Pursuant to the respiratory protection standard set forth at 29 C.F.R. Section 1910.134, the Occupational Safety and Health Administration (OSHA) requires covered employers, including the Respondent, to establish a detailed, written respiratory protection program. Among other provisions, OSHA's respiratory protection standard prohibits covered employers from allowing any employee to wear a tight-fitting respirator if the employee has "[f]acial hair that comes between the sealing surface of the facepiece and the face or that interferes with valve function." *Id.*

The Respondent maintains an OSHA-compliant Respiratory Protection Program, which had been approved by a joint labor-management General Safety Committee. At a General Safety Committee meeting on July 30, 2009, the Respondent's plant manager, Jim McNichol, mentioned that employees being fitted for respirators "must be clean-shaven to get a proper fit." McNichol's remark led to discussions among employees, supervisors, managers, and union representatives concerning what McNichol meant by "clean-shaven." Alerted to these discussions, McNichol promptly sent an e-mail to supervisors and managers stressing that the Respondent required nothing more than what the OSHA standard mandated.

What followed was a triumph of posturing over sound labor relations. On August 1, 2009, Union Assistant Business Manager Shannon Fitzgerald emailed Respondent's Labor Relations Supervisor Ginger Lynch. Fitzgerald alleged that McNichol's comment that employees

¹ *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1979).

“must be clean-shaven” represented a unilateral change in the Respondent’s Respiratory Protection Program. Fitzgerald requested a copy of the unilaterally changed program. He also demanded that the Respondent cease and desist from implementing the “new” program until it had bargained with the Union and that he be informed of the proposed implementation date of the “new” program and of the disciplinary consequences if an employee failed to comply with it.

Lynch responded to Fitzgerald by email on August 5. She attached a copy of the Respondent’s existing Respiratory Protection Program, which showed that there had been no change in the program and that there was no “clean-shaven” requirement beyond what the OSHA standard mandated. In her email, Lynch reiterated the OSHA standard, writing that the “federally-required ‘fit tests’ specifically prohibit ‘any hair growth’ between the skin and the facepiece sealing surface of the respirator.” Lynch also rejected Fitzgerald’s bargaining demand, stating that the Respondent was “obligated to comply with OSHA” and that “whether to comply with federal law” would be “an illegal subject of bargaining.”

Unsatisfied, Fitzgerald continued to insist, in further emails to Lynch dated August 6 and 18, that the Respondent had unilaterally established a new “clean-shaven” policy. On August 25, the Respondent instructed its crew supervisors to send any employees who were not current on their respirator-fit testing for a test. The next day, Fitzgerald emailed Lynch a list of questions, including what would happen if an employee failed the test. Lynch replied that she could not speculate on the consequences of an employee’s failure to pass “the OSHA-mandated tests.”

In sum, there is no evidence that the Respondent altered its Respiratory Protection Program in any way. The copy of the Respiratory Protection Program Lynch provided Fitzgerald showed that the program was unchanged, and Lynch repeatedly made clear to Fitzgerald that the Respondent’s program requires what OSHA requires, nothing more.

Tacitly admitting that the wording of the Respiratory Protection Program never changed, my colleagues rest their unilateral-change finding on evidence that two employees were required to be completely clean-shaven before being tested and Fitzgerald’s testimony that “a ton [of employees] shaved.” As to Fitzgerald’s testimony—which the judge may have implicitly discredited, since he does not mention it in his decision—the fact that employees shaved because they believed, mistakenly, that the Respiratory Protection Program had changed does not prove that the program had, in fact, changed. And without more, testimony that two employees were re-

quired to be clean-shaven before being tested does not establish that those two employees were required to shave facial hair that the OSHA standard would have permitted.² But even assuming the managers who required the two employees to shave misapplied the Respondent’s Respiratory Protection Program, this does not demonstrate that the *program itself* had changed. See, e.g., *Champion Parts Rebuilders, Northeast Div. v. NLRB*, 717 F.2d 845, 852 (3d Cir. 1983) (isolated actions by supervisors do not amount to unlawful unilateral change where employer policy remains unchanged); *P.A. Incorporated*, 259 NLRB 833, 835 (1982) (“simple [supervisor] mistake with minimal effect on only a few employees for a brief period of time” does not amount to Section 8(a)(5) violation where employer policy remains the same). Fitzgerald also admitted that some employees with facial hair successfully completed the fit-testing requirement, which contradicts the claim that a clean-shaven policy had been implemented. I would adopt the judge’s dismissal of this allegation.

III. Alleged 8(a)(5) Failures to Furnish Requested Information

Reversing the judge’s decision, my colleagues find five instances when the Respondent unlawfully failed to furnish requested information. For the following reasons, I would affirm the judge’s dismissal of all five allegations.

A. Requests for Information about Alleged Implementation of New “Clean-Shaven” Policy. The majority finds that the Respondent violated Section 8(a)(5) by not answering the Union’s requests for information about the alleged implementation of a new “clean-shaven” policy. As the judge concluded and as I have established above, however, the Respondent never implemented a new “clean-shaven” policy. The Respondent had no duty to provide information about an alleged new policy that did not exist. Further, the Respondent gave the Union a copy of its existing Respiratory Protection Program and repeatedly confirmed that the program had not changed. I disagree with my colleagues that these responses were, in their words, “incomplete and vague.” In her email to Fitzgerald (attaching a copy of the Respondent’s existing, unchanged Respiratory Protection Program), Lynch reiterated the OSHA standard, accurately stating that “federally-required ‘fit tests’ specifically prohibit ‘any hair growth’ between the skin and the facepiece sealing surface of the respirator.” Lynch also rejected the Un-

² Contrary to my colleagues’ assertion, the record does not establish that the two employees who shaved had facial hair compliant with the OSHA standard. It might have been obvious to the managers who required them to shave that their facial hair would have interfered with a proper fit.

ion's demand to bargain on the basis that the Respondent was "obligated to comply with OSHA," the parties could not bargain over "whether to comply with federal law," and doing so would involve "an illegal subject of bargaining." These statements, fairly understood, made clear that the Respondent was continuing to require what it had previously required—compliance with the OSHA standards, nothing more—and that it had not changed its Respiratory Protection Program, from which it necessarily followed that the Union was asking for information that did not exist. The judge correctly dismissed this allegation.

B. *Request for Notes of Silas and Claw Interviews.* In early 2009, employees Everand Silas and Guy Claw engaged in a physical altercation. After an investigation, Department Manager Matthew Zersen decided to terminate both of them for violating the Respondent's rules against jobsite violence. Labor Relations Supervisor Lynch helped Zersen investigate the incident. She took notes of the interviews of Silas, Claw, and an individual who had witnessed the altercation. Zersen did not take notes during the interviews, and the judge credited his testimony that he did not review Lynch's notes before deciding to terminate Silas and Claw. A union steward attended all three interviews and had a full opportunity to take notes. At Zersen's direction, Lynch drafted discharge recommendation memos and sent them to Director of Human Resources Services Anna Ortiz.

The Union filed grievances over the discharges. At the first-step grievance meeting, the Respondent gave the Union copies of Lynch's discharge recommendation memos from which Lynch's version of events was redacted and replaced with summaries of what the Respondent deemed were the pertinent facts. The Union requested unredacted copies of the discharge recommendation memos. The Union also requested "[a]ny and all documentation that [the Respondent] used or considered that it had not previously supplied concerning the [Silas and Claw discharge] grievances, including any and all notes taken that were used in determining the terminations at issue in [the Silas and Claw discharge] grievances" (emphasis added). Assistant Business Manager Fitzgerald testified that the Union wanted to know what the Respondent's decision-makers had in front of them when they decided to discharge Silas and Claw. The Respondent denied both requests.

The judge found that the Respondent violated Section 8(a)(5) by refusing to furnish unredacted copies of the discharge recommendation memos. I agree with my colleagues' decision to affirm the judge's decision in this regard. The unredacted memos were the best available summaries of the facts that led to the termination deci-

sions. Additionally, Ortiz relied on the memos in providing high-level Human Resources approval of the discharge decisions.

The judge dismissed, however, the allegation that the Respondent also violated Section 8(a)(5) by refusing to furnish the Union with Lynch's interview notes. In dismissing this allegation, the judge primarily relied on the fact that a union steward was present for the interviews and therefore had equal access to the same information. The judge also concluded that the notes were subject to the attorney work-product privilege.

My colleagues reject the judge's rationale, reverse his dismissal, and find the 8(a)(5) violation as alleged. I would affirm the judge's decision to dismiss this allegation, but without passing on the judge's rationale. In my view, the Respondent's refusal to furnish Lynch's interview notes was lawful for a much simpler reason: the Union did not request them. As noted above, the Union requested "[a]ny and all documentation that [the Respondent] used or considered . . . concerning the [Silas and Claw discharge] grievances, including any and all notes taken that were used in determining the terminations at issue" (emphasis added), and Fitzgerald confirmed that the purpose of the request was to obtain what the Respondent's decision-makers had in front of them when they decided to discharge Silas and Claw. The decision-maker was Zersen, and perhaps also Ortiz, and neither of them saw Lynch's interview notes before deciding to terminate Silas and Claw. Zersen credibly testified that he did not review any notes before making his decision,³ and Lynch sent Ortiz the discharge recommendation memos, not her interview notes. As a result, neither Zersen nor Ortiz "used" or "considered" Lynch's interview notes. Thus, as the Respondent argues, the notes were not within any fair reading of the Union's information request and need not have been produced. See, e.g., *PRC Recording Co.*, 280 NLRB 615, 644–645 (1986) (employer did not violate Section 8(a)(5) by not furnishing information that union never demanded), *enfd.* sub nom. *Richmond Recording Corp. v. NLRB*, 836 F.2d 289 (7th Cir. 1987).

C. *Request for the Larkin Contract.* The judge found that the Respondent did not violate Section 8(a)(5) of the Act when it refused to furnish the Union a copy of the contract between itself and a contractor that supplies the Respondent with supplemental employees. My colleagues reverse. I would affirm the judge's dismissal of this allegation.

³ My colleagues uphold the judge's credibility determinations, yet they find that Zersen reviewed Lynch's notes.

The parties' collective-bargaining agreement allows the Respondent to use "supplemental employees" and "contractor employees." Supplemental employees are supervised by the Respondent; contractor employees are supervised by third-party contractors. The collective-bargaining agreement does not restrict the Respondent's right to use contractor employees. However, the agreement specifies that any supplemental employee may not be employed for more than 4 months at a time and that supplemental employees' wages must comport with those of bargaining-unit employees.

Larkin Enterprises, Inc. (Larkin) provided supplemental employees to the Respondent, including supplemental employee Gerald Powell. In 2009, the Union filed a grievance alleging that the Respondent had used Powell for more than 4 months. The Union requested Powell's payroll records and a copy of the Respondent's service contract with Larkin. The Respondent gave the Union all of Powell's wage and hour records, but it refused to furnish a copy of the Larkin contract, explaining that the contract contained confidential and proprietary information that was not relevant to the pending grievance. The Respondent also told the Union that it would strive to answer any "specific and relevant question related to the terms and conditions in" the Larkin contract.

The General Counsel concedes that the Larkin contract is not presumptively relevant to the Union's duties as the unit employees' representative. See, e.g., *Sunrise Health & Rehabilitation Center*, 332 NLRB 1304, 1305 & fn. 1 (2000) (noting that subcontracting information is not presumptively relevant). The Union, therefore, has the burden of establishing the contract's relevance to the Union's representative function. See, e.g., *Disneyland Park*, 350 NLRB 1256, 1257–1259 (2007) (finding no Section 8(a)(5) violation where union failed to show that subcontracting information was relevant to contract-breach grievance); *Connecticut Yankee Atomic Power Co.*, 317 NLRB 1266, 1267–1268 (1995) (union failed to establish relevance of information about contractor that supplied temporary employees). As the judge noted, the Union must show a "logical foundation and a factual basis" for its information request. See, e.g., *Postal Service*, 310 NLRB 391, 392 (1993).⁴ Contrary to the ma-

jority, I agree with the judge's finding that the Union failed to meet its relevance burden.

My colleagues find that the Larkin contract is relevant to the Union's representative function on the basis that it might shed light on whether the Respondent's use of Powell allegedly for more than 4 months was intentional or inadvertent. But the Respondent's intent is irrelevant to the merits of the Union's grievance regarding Powell. Motive is not an element of a grievance alleging a breach of contract. See, e.g., *Tuf Racing Products, Inc. v. American Suzuki Motor Corp.*, 223 F.3d 585, 589 (7th Cir. 2000) (motive irrelevant to contract issue); *Weitz Co. LLC v. MacKenzie House, LLC*, 665 F.3d 970, 975 (8th Cir. 2012) (upholding trial court's exclusion of motive and intent evidence in breach of contract case); *Unit Drilling Co. v. Enron Oil & Gas Co.*, 108 F.3d 1186, 1194 (10th Cir. 1997) (same). The parties' collective-bargaining agreement does not permit or proscribe the use of supplemental employees depending on whether their use is intentional or inadvertent. It simply proscribes their use for more than 4 months. Powell's payroll records showed how long he had been employed at the Respondent's facility. By providing the Union with Powell's payroll records, the Respondent disclosed all the information that might have been relevant to the Powell grievance. The Larkin contract was irrelevant, and the Respondent lawfully refused to furnish it.⁵

D. *Request for Reasons Specific Employees Were Included on the Cyber-Security List.* I would affirm the judge's finding that the Respondent did not violate Section 8(a)(5) of the Act when it refused to explain to the Union its reasons for placing certain employees on its cyber-security list.

As an electric utility, the Respondent is regulated by the Federal Energy Regulatory Commission (FERC). The FERC has established Critical Infrastructure Protection (CIP) standards to safeguard the nation's power grid from terrorist attack. One such standard requires that FERC-regulated utilities develop a personal risk assessment (PRA) program to prevent persons who pose security risks from having unescorted access to the utility's sensitive cyber facilities. Clearly, this is a matter of grave importance, and employees covered by the PRA program must undergo a 7-year criminal background check.

⁴ In addition, I would require the factual basis of the request to be disclosed to the employer at the time of the request, unless that basis is readily apparent from the surrounding circumstances. See, e.g., *Bud Antle, Inc.*, 361 NLRB No. 87, slip op. at 2 (2014) (Member Miscimarra, concurring) (citing *Hertz Corp. v. NLRB*, 105 F.3d 868 (3d Cir. 1997)). Here, however, the Union never furnished a factual basis for requesting the Larkin contract. I disagree with my colleagues that the basis of the request was apparent from the grievance itself, given the irrelevance of the Larkin contract to the allegation in the grievance.

⁵ My colleagues reason that the Union might have dropped the grievance if the Respondent's alleged use of Powell for more than 4 months (which was never established) had been unintentional, and the terms of the Larkin contract might have shed light on that question. There is no evidence, however, that the Union stated this purpose to the Respondent when it made the request. And in any event, as discussed above, the Respondent's intent was irrelevant to the merits of the grievance.

During negotiations for a collective-bargaining agreement, the Respondent and the Union were unable to agree on changes to the Respondent's FERC-mandated PRA program, but they did agree to submit those issues to interest arbitration. The arbitrator formulated a cyber-security policy that included broadly worded guidelines for determining which employees should be covered by the PRA program. Specifically, the arbitrator ruled that covered employees must have a "reasonable connection to cyber security," meaning that their duties entail "more than isolated instances" of "unescorted access to cyber assets." Critically for deciding the issue presented here, the arbitrator entrusted the determination of which employees have the necessary "reasonable connection to cyber security" and therefore must undergo a PRA to the Respondent's sole discretion.

As a separate matter, the arbitrator recognized that if an employee fails a PRA, the employee could be demoted or terminated as a result. The arbitrator ruled that any adverse employment action resulting from a PRA would be subject to the grievance-arbitration procedures in the collective-bargaining agreement.

In February 2010, the Respondent informed the Union that it was about to implement the cyber-security policy. The Union responded by requesting the names of all employees required to undergo a PRA and "a statement . . . as to why each employee has a reasonable connection to Cyber Security." The Respondent furnished the names of PRA-covered employees, but it did not explain its PRA coverage determinations other than to say that "these determinations were made in accordance with the provisions of the arbitration award." After the Union continued to demand the Respondent's reasons for including each specific employee on the cyber-security list, the Respondent reminded the Union that the arbitrator's decision "gives management the discretion to determine what classifications of employees are subject to the Cyber Security policy."

The judge concluded that the Respondent was not obliged to give the Union information justifying its PRA-coverage decisions because the interest arbitrator's award (which was, in effect, part of the labor contract) left those decisions to the Respondent's discretion. I agree. Although the award gave the Union the right to grieve demotions and terminations resulting from adverse PRA adjudications, it did not give the Union the right to challenge the Respondent's decisions regarding *who* must undergo a PRA. The arbitrator held that the latter decisions are within the Respondent's sole discretion. The word *discretion* means "the right to choose what should

be done in a particular situation."⁶ Accordingly, the Respondent had the sole right to choose whom to include on the cyber-security list, and it did not violate Section 8(a)(5) by refusing to explain to the Union why specific employees were included on the list.

In finding to the contrary, the majority relies on the Union's right to grieve demotions and terminations that result from adverse PRA adjudications. I believe my colleagues' rationale conflates two separate decisions: whether a particular employee must *undergo* a PRA, and whether an employee selected to undergo a PRA has *passed or failed* the PRA. The Union's grievance rights pertain to the latter, not the former. Once an employee has undergone a PRA, has failed, and has been demoted or terminated as a result, the Union may grieve the demotion or termination. It may be that in connection with such a grievance, the Union would be entitled to know why the Respondent decided the employee presented an unacceptable security risk. But that is not the issue presented here. The Union wanted the Respondent to explain why it decided to select specific employees to undergo a PRA. Those decisions are within the Respondent's sole discretion and are not arbitrable under the terms of the interest arbitrator's decision. Accordingly, the Respondent had no duty to disclose that information. See, e.g., *Ethicon, A Johnson & Johnson Co.*, 360 NLRB No. 104, slip op. at 5–7 (2014) (finding no violation where employer declined to provide information about contract right that was not arbitrable).

E. *Request for Information Relating to Cox Investigation*. Finally, I dissent from the majority's finding that the Respondent violated Section 8(a)(5) of the Act when it declined to disclose information requested by the Union in connection with the Respondent's investigation of misconduct committed by employee and union steward Eric Cox. Cox was undeniably guilty of misconduct during an important employee training session, including repeatedly interrupting the managers who were conducting the training, adopting a posture of physical intimidation toward one of those managers, and insubordinately refusing to leave the meeting. Cox admitted during his testimony that his behavior prevented the managers from conducting the training session. At a certain point, Union Business Agent Ed Tafoya arrived on the scene, and after being apprised of the situation, Tafoya walked into the meeting and told the employees that the meeting was ending and they needed to leave. Management then told Tafoya to leave, he refused, and Cox joined Tafoya, stating, "You can't make us leave, and we're staying." After

⁶ <http://www.merriam-webster.com/dictionary/discretion> (last visited July 4, 2016).

investigating the incident, the Respondent chose to act with restraint and decided not to discipline Cox.⁷

On May 5, while the investigation was still ongoing, the Union requested (i) the names of everyone interviewed in the investigation of Cox's misconduct, (ii) the allegations on which the investigation was based,⁸ (iii) the names of employees who made those allegations, (iv) the interview notes for all employees interviewed, and (v) the investigation report. On May 18, the Respondent informed the Union that it had decided not to discipline Cox, and for that reason it was denying the May 5 information request on relevancy grounds. On May 19, the Union filed an unfair labor practice charge alleging that the denial of its May 5 request violated Section 8(a)(5). On May 20, the Union renewed the information request. The Respondent again denied the request on relevancy grounds, adding that the request was also inappropriate in light of the Union's unfair labor practice charge.

The judge dismissed all allegations regarding the Respondent's denial of these requests. As to the first and third requests—for the names of employees interviewed and of those who made the allegations against Cox—the judge found that the potential for harassment of or retaliation against those employees outweighed the Union's need for the information. I agree. Cox was not disciplined, so the Union's need for the information was minimal at best and arguably nonexistent. Conversely, the judge's concern regarding the potential for harassment or retaliation was reasonable. The uncontested evidence established that Cox, a union steward who may have had access to the information had it been turned over, was aggressive, belligerent, and physically intimidating. The evidence also establishes that Tafoya, who certainly would have had access to the information, sided with Cox, backing Cox's goal of disrupting the training session and joining Cox in defiant opposition to the managers conducting the session. Our law has long recognized that there are circumstances in which witness names should not be disclosed. See, e.g., *Metropolitan Edison Co.*, 330 NLRB 107, 107–108 (1999); *Pennsylvania Power*, 301 NLRB 1104, 1105–1107 (1991). Contrary to

my colleagues, I would not second-guess the judge's prudent determination that this is such a case, especially considering that the Union's need for those names was marginal at best.

As to the fourth and fifth requests—for interview notes and the investigation report—the judge found that the requested materials were protected from disclosure as attorney work product. My colleagues reject the judge's finding. I find it unnecessary to reach or pass on it. In my view, the Respondent's denial of these requests and indeed of all the information requests related to the Cox investigation was lawful on two grounds. First, the Union's May 5 request was premature. It was made while the investigation was *still ongoing* and no decision had yet been made whether to discipline Cox for his misconduct—and as it happened, no discipline was imposed. See *General Electric Co. v. NLRB*, 916 F.2d 1163, 1170–1171 (7th Cir. 1990) (employer did not violate Section 8(a)(5) by declining to provide information union requested prematurely); *Tri-State Generation & Transmission Assn.*, 332 NLRB 910, 911 (2000) (same). Second, the Union's May 20 request was tendered *after* the Union filed an unfair labor practice charge alleging that the Respondent had violated Section 8(a)(5) by its May 18 refusal to furnish the information. Accordingly, that request was an inappropriate attempt at discovery in what was now a Board matter. See, e.g., *WXON-TV*, 289 NLRB 615, 617–618 (1988) (where union filed charge one day after requesting information, Board dismissed allegation that employer unlawfully refused to furnish requested information on the basis that request “was akin to a discovery device pertinent to [the union's] pursuit of the unfair labor practice charge rather than to its duties as collective-bargaining representative”), *enfd. mem. per curiam* 876 F.2d 105 (6th Cir. 1989); *General Electric Co.*, 163 NLRB 198, 210 (1967) (“[I]f the General Counsel proceeded on the Union's charge, the upholding of the Union's request for information would require the disclosure of evidence concerning Respondent's defenses which the General Counsel himself would have been legally unable to procure except as adduced at the hearing on his complaint. In that situation the Union would obviously have no better standing than the General Counsel to require disclosure of Respondent's evidence.”), *enf. denied in part on other grounds* 400 F.2d 713 (5th Cir. 1968). On these additional bases, I would affirm the judge's dismissal of this allegation.

CONCLUSION

As to most of the issues in this case, I join my colleagues. As to the issues discussed above, however, I respectfully dissent.

⁷ The General Counsel alleged that the Respondent violated Sec. 8(a)(3) by investigating Cox's misconduct during the training session. I agree with my colleagues, for the reasons they state, that the investigation was not unlawful. Thus, I agree with Member Hirozawa that a mere investigation of employee misconduct, absent any resulting adverse employment action, does not violate Sec. 8(a)(3). Alternatively, even assuming an investigation without more may violate the Act, I agree with Chairman Pearce that the misconduct that was under investigation lost Cox the protection of the Act.

⁸ The judge did not rule on the Union's request for the allegations that were being investigated (the second request). My colleagues do not address this request, and neither will I. What Cox had done to warrant investigation, of course, was all too apparent.

Dated, Washington, D.C. August 22, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with International Brotherhood of Electrical Workers, Local Union No. 611, AFL-CIO (the Union) by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All employees of the Respondent's Electric, Water, Transmission, Distribution, Production, Meter Reader, and Collector departments in the divisions and jobs referenced in the Respondent's collective-bargaining agreement with the Union effective by its terms from May 1, 2009, through April 30, 2012.

WE WILL NOT fail and refuse to respond in a timely manner to information requests made by the Union.

WE WILL NOT unilaterally change the terms and conditions of employment of the employees in the above unit.

WE WILL NOT confiscate union literature from the bulletin boards.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL provide the Union with the following information it previously requested: (1) all asbestos accident

investigations since 2007; (2) all information related to the grievance involving the Respondent's use of Tom Archuleta, an employee of contractor ESSI, Inc.; (3) all information regarding the "other duties" besides meter reader and collector work performed by nonunit employees; (4) the Respondent's contract with Larkin Enterprises, Inc.; (5) the unredacted copies of the discharge recommendation memoranda and the interview notes as related to employees Everand Silas and Guy Claw; (6) a copy of its clean-shaven policy or if there is none, a statement stating that such policy does not exist; (7) all information requested related to the Respondent's inclusion of employees on the cyber-security list; and (8) all information requested related to the disciplinary investigation of union steward Eric Cox.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit.

WE WILL rescind the change to the policy for the access of union agents to our Electric Service Center facility in Albuquerque, New Mexico, that was unilaterally implemented in January 2009, and WE WILL restore the union agents' access rights to the our Electric Service Center facility in Albuquerque, New Mexico, to that which existed from January until August 2009, or in the event the we have generally altered our access procedures, provide the union agents with a form of access substantially equivalent to that which existed between January and August 2009.

WE WILL rescind the clean-shaven policy that was unilaterally implemented on July 31, 2009.

PUBLIC SERVICE COMPANY OF NEW MEXICO

The Board's decision can be found at www.nlrb.gov/case/28-CA-022655 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Liza Walker-McBride, Atty., for the Acting General Counsel with the brief by *David T. Garza, Atty.*

Jeffrey L. Lowry and Thomas L. Stahl, Attys. (Rodey, Dickason, Sloan, Akin & Robb, P.A.), of Albuquerque, New Mexico, for the Respondent.

John L. Hollis, Atty. (Law Offices of John L. Hollis), of Albuquerque, New Mexico, for Local 611.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. I heard this consolidated proceeding over the course of 8 days between August 31 and November 5, 2010, at Albuquerque, New Mexico. Together the separate complaints issued by the Regional Director for Region 28 allege, on the basis of charges filed by the International Brotherhood of Electrical Workers, Local Union No. 611, AFL-CIO (the Charging Party, the Union, Local 611), that Public Service Company of New Mexico (Respondent, the Company, PNM) engaged in numerous violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). Respondent's timely answers deny that it engaged in the unfair labor practices alleged. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel, PNM, and Local 611, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New Mexico corporation, with a principal office and place of business in Albuquerque, New Mexico, has been engaged in the purchase, production, transmission, and retail sale of electricity. During the 12-month period ending May 19, 2010, Respondent derived gross revenues in excess of \$500,000 from its primary business operations. During the same 12-month period Respondent purchased and received at its various facilities in the State of New Mexico, goods valued in excess of \$50,000 directly from locations outside the State of New Mexico. Accordingly, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that it would effectuate the purposes of the Act for the Board to exercise its statutory jurisdiction to decide this labor dispute.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Charges and the Pleadings

All of the complaints allege that Local 611 is the exclusive bargaining representative of the employees in the following unit (unit):

All employees of the Respondent's Electric, Water, Transmission, Distribution, Production, Meter Reader, and Collector departments in the divisions and jobs referenced in Respondent's collective-bargaining agreement with the Union effective by its terms from May 1, 2009, through April 30, 2012.

PNM admits Local 611 is a 2(5) labor organization that it has recognized as the exclusive representative certain employees covered by a series of bargaining agreements, including the agreement effective from May 2009 through April 30, 2012.

The amended consolidated complaint in Cases 28-CA-22655 and 28-CA-22759 is based on charges filed by Local 611 on August 26 and October 29, 2009, respectively. This complaint, issued on March 24, 2010, alleges that PNM violated Section 8(a)(1) and (5) of the Act by failing or refusing to provide Local 611 with all or most of the information sought in nine separate requests made between March 31 and October 1, 2009. It also alleges that PNM violated the same statutory provisions by unilaterally changing six separate terms and conditions of employment affecting the unit employees.

The complaint in Case 28-CA-22997, issued on June 30, 2010, is based on a charge filed by Local 611 on April 12, 2010. As amended at the hearing, it alleges that PNM violated Section 8(a)(1) and (5) by failing or refusing to provide Local 611 with the information sought in two additional requests it made on February 12 and March 26, 2010.

Local 611 filed the charge in Case 28-CA-23046 on May 19, 2010, and the Regional Director issued a complaint in that case on July 30. It alleges that PNM violated Section 8(a)(1) by the conduct of a supervisor who removed union-prepared *Weingarten* forms from bulletin board at its Electric Service Center (ESC) on Edith Boulevard in Albuquerque and informed employees that the forms had been removed because they induced employees to refuse to cooperate with workplace investigations. This complaint also alleges that PNM violated Section 8(a)(1) and (3) by removing a union steward from an employee training meeting and by subsequently conducting a disciplinary investigation concerning the steward's conduct. Finally, this complaint alleges that PNM violated Section 8(a)(1) and (5) by failing or refusing to provide Local 611 with the information it requested about that investigation.

B. The Independent 8(a)(1) Allegations

Paragraph 5(a) of the complaint in Case 28-CA-23046 alleges, in effect, that sometime in April 2010 Supervisor Dale Smyth confiscated *Weingarten* notice forms from the Union's bulletin boards at PNM's ESC facility in Albuquerque. Paragraph 5(b) alleges that Smyth told employees he had removed the *Weingarten* because they obstructed PNM's workplace investigations by inducing a lack of cooperation by employees.¹

1. Relevant facts

The foremen's office at the ESC in Albuquerque has four desks and serves as a location where 16 or so employees perform their paperwork. PNM management posts a variety of work-related notices (bargaining proposals, bargaining progress reports, overtime rosters, crew assignments, safety information, and tool information), a bulletin board located in the foremen's office. Employees also post personal notices on that board.

In mid-April 2010, Union Steward Eric Cox posted one or more copies of a *Weingarten* form² prepared by Local 611 As-

¹ No evidence was adduced to support the par. 5(b) allegation, and neither the Acting General Counsel nor Local 611 alluded to it in their briefs. For this reason, I recommend dismissal of this allegation without further consideration.

² Tafoya sent copies of the form (Jt. Exh. 68) to all 20 of the Electric Services Business unit stewards statewide for distribution by them. The form read as follows:

sistant Business Manager Edward Tafoya on the foremen's office bulletin board and six other bulletin boards around the ESC facility. (Tr. 791–792, 832.) Cox also put copies of the form in the mailboxes of the unit employees that are also located in the foremen's office. Either he or someone else put some of the forms on a couple of the desks in the foremen's office. Supervisor Mark Martinez, who characterized the forms as “amnesty forms,” saw Cox distributing them in the mailboxes. He asked for, and received a copy from Cox but made no attempt to interfere with the distribution.

Before the shift started the following morning, Roger Kinkaid, an ESC working foreman, observed his supervisor, Dale Smyth, “rip” at least one copy of the *Weingarten* form from the bulletin board in the foremen's office, throw it in the waste can, and walk back out without saying a word to either himself, or Richard Reese, another ESC working foreman present at the time. (Tr. 782–784.) Later that morning, Kinkaid told Cox about the episode. Cox confirmed that a form was missing from the bulletin board and reported the matter to Tafoya.

The next day Tafoya visited the ESC on another matter. While there, he met with Cox and, together, they decided to speak with Smyth about removing the form. On their way to Smyth's office they met and questioned Line Department Manager Jeff Nawman, Smyth's immediate supervisor, about the removal of the form. Nawman professed to know nothing about the episode but accompanied the two union agents on to Smyth's office. Once there, Tafoya confronted Smyth about removing the form and questioned his authority to do so. Smyth became irritated by the inquiry but admitted that he removed the form and said that Metro Operations Director Kirk Moser told him to do it. With that Smyth walked away from Tafoya and the others, saying he did not have time for this “shit.”³ Cox reposted the missing copy of the form that afternoon. Since then there have been no known attempts by the

managers or supervisors to remove copies of the form; they remained available on the ESC bulletin boards at the time of the hearing.

2. Argument and conclusions

The Acting General Counsel and Local 611 argue that by trashing the *Weingarten* form in the presence of two employees, Smyth violated Section 8(a)(1).⁴ PNM, which disputes Tafoya's characterization of the foremen's office bulletin board as a dedicated union board, asserts that the form Tafoya authored “misrepresents *Weingarten* rights and improperly encourages employees to obstruct Company investigations.” It also contends this single action lacks any coercive quality where the form was widely distributed at the ESC and other facilities throughout the State, and even the discarded form was quickly replaced.

Although two employees observed Smyth remove Tafoya's form, I find his conduct lacked any coercive character. PNM and Local 611 have a mature bargaining relationship spanning decades. The wide distribution of the form, the lack of other similar incidents, or any accompanying statements by Smyth to the two employees all weigh in favor of a conclusion that the incident was not coercive. This conclusion is reinforced by the inference suggested by Kinkaid's puzzlement at the need to describe the incident while testifying because he had other copies of the form in front of him on his desk at that very time. The more reasonable conclusion from the evidence amounts to little more than the fact that Smyth carried out a superior's instruction to get a copy of the publicly posted form for review by management.

Furthermore, the cases cited in the Acting General Counsel's brief—*Publix Super Markets*, 347 NLRB 1434, 1435 (2006); *Heartland of Lansing Nursing Home*, 307 NLRB 152, 160 (1992); and *Jennings & Webb, Inc.*, 288 NLRB 682, 690–692 (1988)—are factually distinguishable. These cases involve either a *disparate* application of employer bulletin board rules or a clean sweep removal of all union materials. They simply do not support the arguments of the Acting General Counsel and Local 611 that mere observation by two employees of Smyth removing a form amounts to coercion as that term is used in Section 8(a)(1). Accordingly, I recommend dismissal of this allegation.

C. The 8(a)(3) Discrimination Allegations

Paragraphs 6(a) and (b) of the complaint in Case 28–CA–23046 allege that PNM violated Section 8(a)(3) on April 21, 2010, when Nawman and Supervisor Smyth removed Union Steward Eric Cox from a management-employee meeting, and

The Company has asked me to participate in an interview. I request that I be represented by my Steward _____. I will waive my right to have a steward present if the Company will acknowledge that nothing I say or do in this interview will be used to discipline me in any manner. The Company will acknowledge this by the signing of this document.

_____ Employee	_____ Date
_____ For PNM	_____ Date

If the Company representative is unwilling to sign this I will have cause to believe that I may be subject to discipline. Therefore I request that my Union Steward or Representative be present to assist me at this meeting. I further request reasonable time to consult with my Union Representative regarding the subject and purpose of this meeting. Please consider this a continuing request and without representation, I shall not willingly participate in the discussion.

_____ Name	_____ Date
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³ Although Smyth testified about another matter, he provided no testimony about this subject. Moser did not testify.

⁴ Sec. 8(a)(1) provides that it is an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.” As relevant here, Sec. 7 provides that employees have the right “to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities.”

by PNM's subsequent disciplinary investigation of Cox's conduct at the meeting.

1. Relevant facts

Sometime in late 2009 or early 2010, PNM purchased an automated call-out system called TeleStaff for use in assembling repair crews after normal work hours. Although PNM previously used an automated call system, TeleStaff contained added features, including one that permitted the linemen to report that they were on sick leave, vacation, or the like without calling a dispatcher or their supervisor. When the lineman did so, TeleStaff automatically removed the employee from the pool of available linemen for after-hours work.

Overall responsibility for implementing the TeleStaff system rested with Line Department Manager Nawman, the person in charge of the department where it was to be used. His subordinates, Distribution Operations Manager Mary Ann Brandon and Craft Supervisor Smyth, served on the management team responsible for implementing TeleStaff and training employees on its use. Brandon and Smyth scheduled a training meeting for April 21 with roughly 13 linemen for the purpose of explaining, demonstrating, and testing the system. After the hands-on phase of this meeting, they planned to obtain employee feedback so they could make adjustments prior to rolling out the new system for general use.

Well before Brandon and Smyth scheduled the April 21 session, Nawman asked Local 611 steward Eric Cox on a couple of occasions about objections Local 611 might have to conducting a training/feedback session with some of the linemen. After hearing nothing from Cox, Nawman decided to proceed with the initial TeleStaff information session.

Local 611 obviously had suspicions and reservations about the implementation of the TeleStaff system early on. Nine days before the April 21 meeting, Local 611 filed an unfair labor practice charge (Case 28-CA-22997) alleging, among numerous other matters, that PNM "unilaterally changed . . . (the) call-in requirements to call in for personal leave and vacation."⁵ (GC Exh. 1(v).)

Craft Supervisor Smyth arranged the April 21 session for the Sandia Room, a conference room at the ESC and invited the specific linemen who ultimately attended. As the immediate supervisor of the dispatchers responsible for dispatching the proper workers for outages and service calls statewide, Brandon's lead role at this meeting was to explain and guide the linemen through the use of the system. Smyth's role, it soon turned out, largely became that of attempting to maintain rudimentary decorum, a task at which he clearly failed though no fault of his own.

Sometime prior to the meeting, Nawman instructed Craft Supervisor Mark Martinez, Union Steward Cox's immediate supervisor, to release Cox from his standard work assignment so he could attend the TeleStaff meeting in his capacity as the Local 611 steward. Eric Cox has served as a union steward at

the Albuquerque ESC for the 4-year period preceding the hearing. Under the collective-bargaining agreement in effect between PNM and Local 611, stewards are provided with paid time to perform their representational duties. That agreement also requires the stewards to perform their duties "with a minimum of interference with the Company's operations." (See GC Exh. 5, p. 10.)

Early in the April 21 meeting, a lineman asked Brandon whether any layoffs would result from the introduction of TeleStaff. Brandon responded, "No, the intent of TeleStaff was to help the dispatchers with the call-out process." Cox broke in at that point asking Brandon to "guarantee" that no layoffs would result from the implementation of TeleStaff and she told him that she could not do that. A colloquy followed between Brandon and Cox in which he continued to insist that she guarantee there would be no layoffs and that she do so in writing. Brandon told Cox that she could not do that either, that the system was designed to help the dispatchers perform their job and that they would continue to follow the union call-out rules. Finally, after Cox persisted in his demand for a written guarantee, Brandon, who has worked at PNM for 30 years, told him that she could not do that because it was "above her pay grade."

Cox then asserted that the TeleStaff implementation should have been negotiated with Local 611 and charged that Brandon was attempting to negotiate directly with the employees. According to Brandon's credible account, Cox went on to assert that "when it was convenient for the company, we would work with the union, and when it wasn't, we were always trying to screw the union." Brandon said she was "taken aback" and admittedly gave Cox a "surprised look, like, wow, you know, I'm kind of surprised you said that." Cox claimed that she rolled her eyes in response. Regardless, Brandon's reaction led to an aggressive response from Cox that she described in this manner:

A. And at that point, Eric, I guess, took offense to my reaction to what he said, and he stood up, and--he was sitting like at the end of the table. And he stood up and put his hands on the table and leaned forward, and he said, in a very raised tone, he said, Don't you ever look at me that way again.

Q. All right. And did he point his finger at you?

A. Yes. So I was a little taken aback by that also, very taken aback.

Q. Did it upset you?

A. It did. Yes.

To Smyth, it appeared it appeared as though Cox, a large man, made an obvious attempt to physically intimidate Brandon.

When Brandon recovered her composure and continued her presentation, Cox made a series of remarks as she was speaking about bargaining directly with employees that Brandon characterized as "snide." Soon, one of the attendees sought to ask a question of Smyth. Cox interrupted before Smyth could answer saying that Smyth needed to answer his question first. Smyth said he would do so before the meeting ended and then attempted to respond to the other lineman's question. As he did so, Cox again interrupted demanding that Smyth answer his question first. This sequence was repeated two or three more

⁵ Presumably, this allegation was withdrawn or found to be without merit, as no related complaint allegation has been made in this proceeding. At one point, Respondent's counsel asserted "the Board's already ruled" on Local 611's claim that PNM unlawfully implemented the TeleStaff system. Tr. 1177.

times until Smyth asked Cox to repeat his question. Rather than doing so, Cox began to belittle Smyth for not listening. Smyth ignored those comments and asked Cox to repeat his question but Cox merely continued to comment about Smyth's failure to listen. Obviously exasperated, Smyth finally told Cox to "just ask your damn question." According to Smyth, whose account I credit, Cox became agitated again. He stood up and told Smyth in a loud tone of voice, "Don't you ever talk to me that way again, and don't you ever point your finger at me that way again."

As shown by the following testimony, Cox admitted that his persistent, intentional, and demanding questioning impaired the ability of the two managers to conduct the meeting:

A. When I asked him if it was different or a change, he didn't give me a response.

Q. He didn't respond at all.

A. He didn't respond to me.

Q. At all.

A. He didn't respond to me. He kept trying to go to another employee.

Q. Okay.

....

Q. At one point, Mr. Smyth told you he would answer your questions at the end, didn't he?

A. Yes, sir.

Q. And you told him that wasn't acceptable to you. Right?

A. I needed an answer while we're talking about it now.

Q. Okay. So Mr. Smyth was trying to run the meeting in the way he found was appropriate, and you wouldn't let him, would you?

A. I needed an answer to my question.

Q. Is the answer to my question yes? You wouldn't let him do what he wanted to do to run the meeting.

A. Yes.

Q. In fact, he tried several times to move on to another person's questions, and you wouldn't let him. Right?

A. I needed an answer to my question.

Q. Is the answer to my question yes?

A. Yes.

(Tr. 845-846.)

Finally, Smyth asked to speak with Cox outside the conference room. The two men went to a nearby private office where Smyth directed Cox leave the meeting because of his repeated disruptions. Cox told Smyth that he did not have "the right to make me leave a meeting; I have the right to be there, and you can't tell me to leave the meeting." Smyth remained adamant that Cox had to leave and told him that he could call his supervisor or Nawman if he wanted. With that Cox walked out the office and Smyth returned to restart the training session.

After a short period, Cox entered the conference room and stated that the meeting had to stop because Brandon and Smyth "were trying to negotiate with individuals" and that the employees could not participate in the meeting. Smyth again directed Cox to leave but he refused, telling Smyth that he did not need his permission to be there. With that Smyth announced a

5-minute break to resolve the situation. Cox told the attendees to remain in the room so he could speak with them but when Brandon and Smyth remained also, he directed the employees to come with him at which time Cox and the employees left.

At about the same time, Line Department Manager Nawman and Supervisor Martinez arrived at the Sandia Room. They then went to a nearby office where Brandon and Smyth explained what was occurring. As they talked, Local 611 Business Agent Tafoya arrived. Martinez joined him and Cox in the hallway for a discussion. Meanwhile, Brandon and Smyth as well as the employees returned to the conference room to resume the TeleStaff training.

As the the meeting was about to resume for the third time, Tafoya entered the room. Smyth explained what happened then:

[Tafoya] said that everybody at this meeting—that everybody here—I believe everybody here is a represented employee, and this meeting is ending, and you guys will need to leave.

Q. All right. So Ed Tafoya, a union business agent, came in and said, the meeting is over. Is that--

A. Yes.

Q. Okay. Then what happened?

A. I kind of was--as he came in and started talking, I walked to the door, too, because I wanted to find out if Jeff Nawman had given him permission to come into the meeting. So I stuck my head out the door, and I didn't see Jeff Nawman anywhere. So I came back in, stepped in, and I told Ed Tafoya that he would need to leave. And he right away says, No, that he doesn't have to have my permission to be here and that I can't make him leave.

And I told him no again. No, Ed, you need to leave this meeting now. And he said, no. And about that time, Eric Cox walked back in the door, and he says, we don't need your permission here; you can't make us leave, and we're staying. And then that is when Jeff Nawman came in and then went ahead and shut everything down.

(Tr. 1165.)

Complaints by Brandon and Smyth about Cox's conduct at the TeleStaff meeting lead PNM executives to assign the in-house labor and employment counsel, Carol Shay, the task of conducting an investigation to determine whether Cox should be disciplined. From the outset, it was Shay's professional judgment that her role also involved that of containing the Union's pending unfair labor practice charge alleging that the Company had unilaterally implemented the TeleStaff system. Shay selected Sonia Otero, a lead human resources consultant, and Craft Supervisor Martinez to assist her in conducting interviews of various witnesses to events of April 21. Otero interviewed Cox during this investigation at which time it became obvious that he was at risk for discipline. However, PNM management eventually decided that Cox would not be disciplined, a decision with which both Brandon and Smyth profoundly disagreed. Nevertheless, HR Director Mathes sent Chris Frentzel, the Local 611 business manager, a letter dated May 18 that stated as follows concerning the investigation:

The Company was well within its rights to conduct an investigation into its employee's, Eric Cox's behavior during the April 21, 2010 meeting despite your May 3, 2010 demand that the investigation be stopped. At the conclusion of the investigation, the Company determined that discipline will not be administered to Eric or anyone else for their behavior during the meeting.

We are troubled, however, by Mr. Cox's actions on April 21, 2010. Specifically, he used a raised and angry tone of voice towards managers. He also refused to leave the meeting room and wait outside for his supervisor after a manager directed him to leave. Mr. Cox's behavior and actions during the meeting could be considered as insubordination. It is important to note that we have given you notice before about Mr. Cox's unnecessarily antagonistic, unprofessional, and disruptive behavior during meetings. While the Company recognizes that Union Stewards are afforded some leeway to zealously represent their members in certain settings, Mr. Cox is not always entitled to such protections as he is not always acting in his capacity as a Union Steward. Like all employees, Mr. Cox is expected to follow his management's instructions, and refrain from insubordination and unprofessional conduct. If Mr. Cox believes that the Company is violating the labor agreement, the principles of "work now, grieve later" still apply and he is expected to conduct himself professionally in such circumstances and avail himself of the parties' dispute procedures at the appropriate time.

(Jt. Exh. 73.)

2. Argument and conclusions

The arguments of the Acting General Counsel and Local 611 that PNM violated Section 8(a)(3) rely largely on their belief that Cox, by reason of the fact that he attended the April 21 meeting in his capacity as a union steward, was engaged in protected union activities.⁶ They assert that his conduct remained protected throughout the meeting and, therefore, the Company's disciplinary investigation of Cox was motivated by his protected activities. PNM argues that Cox, regardless of his role originally, lost the protection of the Act when his conduct at the TeleStaff meeting became disruptive and insubordinate. As these arguments show, the issue for decision is whether Cox's conduct eventually became so egregious as to lose the protection of the Act.

In his brief, the Acting General Counsel argues the Board's *Wright Line* analytical model applies in this situation.⁷ I disagree. The Board has held that *Wright Line* does not apply to situations where, as here, a causal connection may be presumed between the employee's protected activity and the employer's conduct that is alleged to be unlawful. See, e.g., *Aluminum Co. of America*, 338 NLRB 20, 22 (2002). Instead, *NLRB v. Burnip & Sims*, 379 U.S. 21 (1964), provides the appropriate analytical

framework for the resolution of this issue. Applying *Burnip & Sims* here, PNM plainly established that it had reasonable cause to believe that Cox engaged in misconduct at the April 21 meeting. That being so, under *Burnip & Sims* the burden shifted to the Acting General Counsel to show that, in fact, no unprotected conduct occurred. He failed to satisfy that burden.

The Board considers the following four factors when called upon to determine whether an employee's conduct became so egregious as to lose the Act's protection: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's conduct; and (4) whether the conduct was provoked by the employer's unfair labor practices. *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). Applying the *Atlantic Steel* tests here, I have concluded that Cox's conduct at the TeleStaff meeting was not protected by the Act and, for that reason, the investigation by PNM's in-house labor and employment counsel was lawful.

1. The place of the discussion. This factor weighs against protection of the conduct by Cox and Tafoya in disrupting and constructively terminating the April 21 meeting. This discussion occurred in a company conference room with several employees and their immediate supervisor present for what had been planned essentially as an introductory training session conducted by Brandon. The employees in attendance were on paid time and were in attendance as a part of their regular work duties. Although Cox too was a part of the same group and was on paid time, he was not in attendance at this meeting in his capacity as an employee but instead he had been released from his regular duties by his supervisor in order to attend the meeting in his capacity as a union steward serving the affected group.

2. The subject matter of the meeting. This factor weighs against protection of the Act. The TeleStaff meeting was designed to provide preimplementation instructions about a new automated call-out system and to obtain feedback from the affected employees for Brandon's use in implementing the system. The conduct by Cox and Tafoya interfered with the progress of this ordinary work meeting and eventually caused its termination.

Early on, Brandon assured the employees in attendance that PNM's new call-out system would not alter the contractual call-out rules. But that aside, neither Brandon nor Smyth had authority to engage Cox, Tafoya, or any of the employees present about any potential labor relations implications arising from the new system. Hence, the meeting clearly was not for the purpose of carrying on a joint labor-management consultation, addressing a grievance, or engaging in bargaining over the subject involved. No managers or labor relations officials were present who possessed authority to definitively address the issues about which Cox demanded answers and even written assurances.

The inference that the purpose of the meeting was self-evident to all who attended is unavoidable. Brandon, the principal provider of the technical information central to the meeting, was not shown to have the slightest involvement or connection with establishing, implementing, or administering PNM's labor relations policies. The place, the participants, and the subject matter of the meeting all serve to establish that the

⁶ Sec. 8(a)(3) provides that employer "discrimination [against employees] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization" constitutes an unfair labor practice.

⁷ *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

meeting was obviously designed only as an introductory training/feedback session for the employees in attendance. The questions about layoffs that arose at the meeting pertained to the dispatchers who were not present rather than the linemen who were present. The labor relations issues that Cox pressed and that dominated the meeting until Smyth sought to exclude him had virtually nothing to do directly with the original, work-related purpose of the meeting. This difference is highly significant. See, e.g., *Postal Service*, 268 NLRB 274, 275 (1983) (“[I]n the administration and resolution of grievances under the collective-bargaining agreement, because of the nature of these endeavors, tempers of all parties flare and comments and accusations are made *which would not be acceptable on the plant floor.*” (Emphasis added.)) This confrontation initiated by Cox and continued by Tafoya occurred in a plant floor context, not a bargaining table context.

3. The nature of Cox’s conduct. This factor weighs strongly against protection of the conduct by Cox and Tafoya in disrupting and effectively terminating the April 21 TeleStaff meeting. From the outset of the meeting Cox protested that the implementation of the TeleStaff system should have been negotiated with the Local 611. Later in the meeting, he openly made a baseless accusation that Brandon and Smyth were trying to negotiate directly with employees. Despite the fact that Smyth told Cox that he would answer his questions at the end of the meeting, Cox repeatedly interrupted questions by the other attendees demanding that his questions be answered first.

Cox admittedly sought to disrupt this meeting using this tactic. In the limited periods when he did not interrupt directly, Cox stood in the back of the room uttering snide, derogatory, and audible comments concerning the meeting. He insisted that Brandon “guarantee” that implementation of the TeleStaff system would not result in the layoff of any dispatcher employee. This persistent demand soon became an equally persistent demand that Brandon sign a written guarantee to that effect.

I find Cox’s insistent behavior on this subject, coupled with his menacing tone and gestures toward Brandon because of her reaction of dismay at his behavior, completely out of place in this particular situation. Cox’s subsequent effort to bully and belittle Smyth when this supervisor sought to answer questions posed by other employees was likewise inappropriate and out of place in this setting. After his conduct finally provoked Smyth to eject Cox from the meeting, Cox became belligerent and insubordinate. After his arrival, Tafoya reinforced Cox’s behavior by ignoring Smyth’s directions and demanding that the meeting stop immediately. Finally, this blatant interference compelled Nawman to call the meeting off.

4. Provocation by Respondent. This final factor also weighs against the protection or, at best, it is neutral. The evidence merits the inference that Local 611 did not prevail on the 8(a)(5) unfair labor practice charge that PNM unilaterally implemented the TeleStaff call-out system. Similarly, no evidence establishes that Local 611 ever filed a grievance relating to the implementation of the TeleStaff system.

In my judgment, the out-of-control conduct by Cox and Tafoya that prevented the PNM officials from conducting an orderly, legitimate business meeting with its employees substantially exceeds the disruptive employee actions the Board

found unprotected in *Carrier Corp.*, 331 NLRB 126 fn. 1 (2000). This is especially true where, as here, Local 611 representatives were contractually bound to perform their representational duties with “minimum interference” to PNM’s operations.

The claim that Smyth lacked authority to bar Cox, or Tafoya for that matter, from the meeting because of their disruptive behavior is specious. Contrary to Cox’s claim, Supervisor Martinez did not “assign” him to attend the meeting at all. Instead, Martinez released Cox from his regular duties so he would be at liberty to attend the TeleStaff meeting in his capacity as the Local 611 steward. Hence, he was there in his representative capacity rather than as an employee engaged in work duties. When Cox abused the negotiated accommodation to perform representational duties on worktime by becoming disruptive and abusive, Smyth had a lawful right to eject him from the ordinary workplace meeting that took place.

As I have concluded that PNM did not violate the Act by its investigation of Cox’s conduct at the April 21 TeleStaff meeting, I recommend dismissal of this allegation.

D. The 8(a)(5) Allegations

The three complaints contain numerous allegations that PNM violated Section 8(a)(5) of the Act.⁸ There are two varieties of refusal-to-bargain allegations. Considered first are those allegations that PNM failed and refused to provide information Local 611 requested and to which it was entitled as the bargaining representative. Considered thereafter will be the allegation that PNM unilaterally changed the terms and conditions of employment of its represented employees.

1. The information allegations

In a nutshell, the law obliges an employer to provide a union with information that is relevant to its carrying out its statutory duties and responsibilities in representing employees. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). This duty to provide information includes information relevant to contract administration and negotiations. *Barnard Engineering Co.*, 282 NLRB 617, 619 (1987); and *Leland Stanford Junior University*, 262 NLRB 136, 139 (1982), *enfd.* 715 F.2d 473 (9th Cir. 1983). The Board applies a broad, discovery-type standard in determining the relevance of requested information even where a union must demonstrate relevance. *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994).

The law deems information that pertains directly to the wages, hours, and other terms and conditions of employment for unit employees as presumptively relevant and requires its disclosure to the bargaining agent upon request. *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61, 69 (3d Cir. 1965). If the infor-

⁸ Sec. 8(a)(5) legally obliges an employer “to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)” of the Act. Sec. 8(d) defines the obligation to bargain collectively, insofar as is pertinent here, as “the performance of the mutual obligation . . . to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party.”

mation sought does not pertain to the wages, hours, and working conditions of the represented employees, no relevance presumption attaches and the union bears the burden of establishing the specific relevance of the information sought. *NLRB v. George Koch Sons, Inc.*, 950 F.2d 1324, 1331 (7th Cir. 1991); *Shoppers Food Warehouse*, supra at 259. This relevance burden exists “whether or not [the] employer requested an explanation of the relevance of the request.” *Schrock Cabinet Co.*, 339 NLRB 182 fn. 6 (2003). The relevance burden is satisfied by a showing that “there is a logical foundation and a factual basis for its information request.” *Postal Service*, 310 NLRB 391 (1993).

Applying these general principles, I now find and conclude as follows with respect to the information allegations.⁹ The three complaints contain the following 13 allegations relating to the failure to provide requested information.

a. Consolidated complaint in Cases 28–CA–22655 and 28–CA–22759

1. Complaint paragraph 6(a)–(c) alleges that PNM failed to produce requested information about asbestos accident investigations. PNM claims that it produced the information relevant to a pending grievance that gave rise to the request but argues that it had no duty to provide the additional information requested because it related to a pending state regulatory matter before the New Mexico Occupational Safety and Health Board (NMOSHB) in which Local 611 was involved.

Relevant facts. This issue arose at PNM’s San Juan Generating Station (San Juan Station) located in northern New Mexico. The initial request here was made on March 31, 2009, in an email from Local 611 Steward Kane Reeves to Ginger Lynch, a PNM human resources supervisor. The email, noting pending grievance SJ-09-12 filed on behalf of a San Juan employee Mike Patscheck, requested that PNM furnish it with information about all accident investigations involving asbestos since 2007 together with asbestos samples taken, lab reports pertaining to those samples, and internal safety department memos concerning exposures in the same period. Reeves renewed his request in an April 24 email to Lynch. (Jt. Exh. 1.)

A letter dated July 20 from Lynch to Shannon Fitzgerald, the Local 611 assistant business manager who services the San Juan Station group, enclosed the requested information, to the degree that it existed at all, but only as it related to the incident in the fall of 2008 giving rise to Patscheck’s grievance. As to information about other incidents both before and after the Patscheck incident, Lynch asked Fitzgerald to explain its relevance. Fitzgerald responded to Lynch’s relevance demand in a July 24 email by quoting specific claims Local 611 used in the Patscheck grievance about PNM’s inadequate response to “numerous (other) fiber release episodes” above the permissible limits. He charged PNM with disregarding its own employee

safety manual, article 8 of the collective-bargaining agreement, and the requirements of a relevant OSHA regulation.

Lynch referred Fitzgerald’s arguments to Corporate Counsel Shay who responded to Fitzgerald in her July 30 letter. Although Shay noted at the outset of her letter that PNM had provided a “variety” of documents to NMOSHB in connection with its ongoing investigation of asbestos exposures at the San Juan Station, she implicitly declined to furnish further information on substantive grounds, i.e., the Patscheck grievance did not involve a matter pertaining to the interpretation or application of the collective-bargaining agreement or the “application of a specific policy to a specific employee.” Additionally, she asserted that his response to Lynch failed to “explain how information regarding potential asbestos exposures back in 2007 is relevant to the bargaining agent under the parties’ collective-bargaining agreement.” However, Shay said that PNM was willing “to entertain input from the Union regarding asbestos safety” at the San Juan Station. Fitzgerald and Shay exchanged further correspondence but it only served to confirm the stalemate that already existed.

In an email responding to Shay, Fitzgerald disputed Shay’s position that the Patscheck grievance was not proper. That led to a response from Shay dated August 4. In that letter Shay noted the simultaneous investigation by the NMOHSB and the fact that the Patscheck grievance sought PNM’s compliance with OSHA as a remedy. In view of this concurrent investigation, Shay asserted that Local 611’s request for information was improper because “the Union’s request relates to an action outside the collective bargaining context.” She also reiterated her earlier claim that Local 611 failed to show the relevance of documents concerning incidents in 2007 to a grievance over an incident in 2008.

Analysis and conclusions. The Acting General Counsel and Local 611 argue that the information sought is presumptively relevant as it all pertains to matters directly affecting unit employees. I agree. PNM’s assertion, initially made by Lynch and later largely adopted by Shay, that it could withhold the requested information because evidence of earlier and later asbestos exposures did not relate to Patscheck’s specific grievance lacks merit. The grievance on its face contends that the 2008 exposure involving Patscheck was a continuing pattern resulting from PNM’s failure to comply with its own safety rules, the collective-bargaining agreement, and an arguably related OSHA regulation. Hence, the presence of other related incidents has obvious relevance to the claims made in the Patscheck grievance and would potentially bear on the success of that grievance. For this reason, I find information concerning previous and subsequent exposure incidents relevant.

Respondent’s claim that the concurrent NMOHSB investigation made Local 611’s claims inappropriate based on the holding in *Southern California Gas*, 342 NLRB 613 (2004), also lacks merit. That case is factually distinguishable. In *Southern California Gas*, the union specifically sought the information in order to “intelligently represent” the unit employees in a matter pending before a state regulatory agency. No concurrent grievance or other initiative under the collective-bargaining agreement existed. Accordingly, the panel majority in *Southern California Gas* concluded that the information at issue was not

⁹ The evidentiary materials show that Local 611 agents often complained about PNM’s failure to timely provide requested information. The evidence shows that some human resources supervisors and managers were reassigned from their normal duties to assist in responding to a backlog information requests by Local 611. There is no complaint allegation that the obvious delays violated the Act.

presumptively relevant to the union's performance of its collective-bargaining duties and, hence, the union failed to meet its burden of showing peculiar circumstances that made the requested information relevant to its representational role. *Id.* at 614. Instead, the panel majority concluded, "the (u)nion's request, on its face, relates *solely* to an action outside the collective-bargaining context—a complaint filed with a State agency." (Emphasis added.) *Id.* at 615. By contrast, I conclude that the disputed information is clearly relevant to the concurrent Patscheck grievance. Hence, a finding that Local 611's request here "relates solely" information about a matter outside the collective-bargaining context would not be supportable.

Accordingly, based on the general legal principles articulated at the beginning of this section, I find that PNM had a duty to furnish all of the information initially requested by Local 611 Steward Reeves, and that it violated Section 8(a)(5), as alleged, by failing to do so.

2. Complaint paragraphs 6(d)–(f) alleges that PNM unlawfully failed and refused to furnish Local 611 with certain bucket truck testing records.

Relevant facts. Apparently by oral request in January 2009, and by emails on April 3 and 14, 2009, Assistant Business Manager Tafoya requested that PNM furnish Local 611 with all bucket truck testing records from the date PNM contracted out the bucket truck testing work to January 15, 2009.¹⁰ (Jt. Exh. 8.) Tafoya's concern about PNM's compliance with its employee safety manual provision (GC Exh. 7, sec. II.A.17.1) requiring the testing of the bucket trucks four times a year prompted this request.

Tafoya sought the information, he said, to support Local 611's bargaining position on the undesirability of subcontracting. (Jt. Exh. 8, Tafoya's April 14 email.) Unit employees performed this work prior to the time that PNM contracted with a local firm, Diversified Inspections (Diversified), to perform the work. Tafoya, suspecting that the outside inspections were proving too expensive, thought PNM might be cutting corners on the inspection schedule.

In February, Tafoya followed up on his oral request of the previous month. At that time, PNM provided him with a user name and a password to the Diversified's website where the bucket truck test records are stored. With this access, Tafoya learned that in fact there had not been full compliance with the safety manual testing schedule during the 2008 calendar year. At the end of March 2009, a PNM executive stated in response to an interrogatory in a pending rate case before the New Mexico Public Utilities Commission (PUC) that compliance with the bucket truck testing schedule had been achieved. When he learned of this, Tafoya insisted there had to be more test records and demanded to see them.¹¹ (Jt. Exh. 8.)

¹⁰ These are trucks with a telescoping boom and bucket mounted on the rear. The device is used to elevate linemen when they need to work on overhead power lines, transformers and so forth. The booms and buckets are lined with an insulating material to prevent the accidental grounding of energized equipment and the electrocution of the worker.

¹¹ In a September 3, 2009 email, Ray Mathes, PNM's labor relations manager, candidly acknowledged that full compliance with the testing schedule had not been achieved in 2008, but by the time PNM's executive answered a Local 611 interrogatory on this subject in the PUC case

In late April, Christa Belt, the human resources representative dealing with this request, provided Tafoya with a spread sheet showing the bucket truck tests performed by Diversified up to that time. In her transmittal letter, Belt also disclosed that added tests may have been conducted by Altec, the manufacturer of the bucket trucks. The evidence shows that the PNM returns the trucks to Altec from time to time for repairs. PNM managers are aware that in the course of this repair work Altec will occasionally perform safety tests similar to those performed by Diversified but Altec does not furnish these test records to PNM. When PNM asked for their test records, Altec told PNM's fleet manager that they did not retain them.

Analysis and conclusions. The Acting General Counsel argues that PNM violated the Act by failing to provide Local 611 with the Altec test records. PNM argues that it did not have any Altec test records and had no duty to disclose them to Local 611. I have concluded that the Altec records lack relevance and, hence, PNM had no duty to provide them to Local 611.

The Acting General Counsel's position is premised on a misapprehension as to the purpose of the tests performed by Altec. The evidence clearly shows that Altec conducts a bucket truck test for its own purposes when necessary as a part of performing a repair. Although the test may be similar or identical to that performed by Diversified, the sporadic testing by Altec has no relationship to the requirements set out in the employee safety manual. Only Diversified performs those tests. Moreover, the underlying purpose of the Altec test shows that it would never have been testing performed in-house by PNM's employees as was the case with the safety manual testing. The Acting General Counsel's argument assumes that Local 611 sought all bucket truck testing records regardless by whom and for whatever purpose. That assumption is not supported by the evidence. Local 611 only sought records for the tests conducted to achieve compliance with the testing required under the employee safety manual that it had been contracted out to Diversified. Tafoya's own testimony makes that quite clear:

Q. When you requested the information initially or at any point, was there any other purpose than to confirm whether the company was in compliance with the four-times-per-year testing?

A. Initially, yes—I'm sorry. Initially, no. We were looking for the safety of the employees. As the time drug on and they did not provide it, it became an issue in negotiations. We submitted or we were offering examples of where subcontracting didn't make sense, the subcontracting that the company was doing did not make sense. One of the illustrations we showed in negotiations was the bucket-truck testing.

And, of course, one of our concerns is that their contractor had not been able to or whether or not their contractor had been able to be compliant with the safety manual rule and the other one was the cost. We—I asked Wilburt Archuleta to do some calculations for us about best he could about what it cost per test and what it cost the company to have the contractor do per test.

on March 31, 2009, compliance with the testing schedule had been achieved. Jt. Exh. 9.

And during negotiations, we brought to them the example that it was cheaper to do it through the substation department, and, of course, our men felt much more comfortable with it being done in-house than contractors.

Q. But that did not happen. Right?

A. That's correct.

(Tr. 543–544.) Even if PNM had access to the Altec test results, which it did not, those were not records which related to the purpose of Local 611's request. Indeed, the Altec tests had nothing to do with the employee safety manual testing requirement at all. Accordingly, I find the claim that PNM violated Section 8(a)(5) by failing to provide the Altec test records lacks merit and I will recommend dismissal of this allegation.

3. Complaint paragraphs 6(g)–(i) pertains to PNM's admitted refusal to furnish Local 611 with a contract it maintained with Larkin Enterprises, Inc. (the Larkin contract), a subcontractor that provided PNM with supplemental employees.

Relevant facts. Articles 40 and 41 of the parties' 2005–2009 collective-bargaining agreement permitted PNM to use supplemental workers for periods up to 4 months at its power production facilities without further agreement on Local 611's part. The remaining terms of the agreement do not apply at all to semi-skilled workers but it controls the hours of work and the rates of pay for skilled workers. (GC Exh. 6, pp. 109–111.) Because of these contractual provisions, a sharp distinction exists between employees of outside contractors and the so-called supplemental employees. For example, the employees of the former are supervised by the management of the subcontractor whereas the ordinary supplemental employee would be supervised within the PNM chain of command. More importantly, supplemental employees can be utilized for only a contractually specified period of time; employees of outside contractors have no similar limitation on the duration of their work.

In early 2009, Local 611 filed a second-step grievance seeking the removal of Gerald Powell (Powell grievance), a supplemental worker in the relay shop at the San Juan Station. (Jt. Exh. 87.) On April 13, Assistant Business Manager Fitzgerald requested that PNM furnish Local 611 by April 20 with certain information related to this grievance, to wit: (1) a copy of the Larkin contract; (2) the wage rate paid to Powell; and (3) PNM's payroll records pertaining to Powell, including records of the dates and hours Powell worked at the relay shop. (Jt. Exh. 10.)

Having heard nothing by July 28, Fitzgerald emailed Ginger Lynch again demanding the information sought for the processing the Powell grievance. (Jt. Exh. 11.) Finally, in an August 4 letter Lynch furnished Fitzgerald with all of the requested information, save the Larkin contract.¹² She explained that PNM would not furnish the Larkin contract because it contained proprietary and confidential information not relevant to the pending grievance. However, she assured Fitzgerald that PNM would "strive to comply" with any "specific and relevant question related to the terms and conditions in the (Larkin) contract" that he submitted.

¹² Lynch's letter acknowledged that Powell had worked "a 10-hour schedule beginning July 2008 through March 2009." Jt. Exh. 12.

Fitzgerald rejected Lynch's offer apropos the Larkin contract on the ground that he could not specify the particular questions Local 611 would have before seeing the contract. As seen in his August 7 email to Lynch, Fitzgerald renewed Local 611's demand for the Larkin contract and offered to sign a confidentiality agreement:

The terms of the contract would allow us to see how long the Company intended to use this worker and if the Company violated the contract on purpose. It would also show if the contract between the parties was extended in order to violate the terms of the Collective Bargaining Agreement between the Union and the Company. Accordingly we must insist on the information that we requested being provided. In the past the Union has agreed to sign reasonable Confidentiality agreements to alleviate the concerns of the Company. We would again offer to do that.

(Jt. Exh. 12.) PNM never furnished the Larkin contract as requested. It also never responded to Fitzgerald's offer to negotiate a confidentiality agreement. Local 611 charges that the processing of the Powell grievance is stymied by PNM's refusal to provide the Larkin contract.

Analysis and conclusions. The Acting General Counsel concedes that the Larkin contract is not presumptively relevant information within the framework of existing case law but asserts that Local 611 established its relevance to the pending Powell grievance, and, as PNM refused to furnish the contract despite Local 611's offer to accommodate confidentiality concerns, it violated Section 8(a)(5). Local 611 made a similar argument. It also contends in a broader sense that the issue at stake involved the policing of the contractual provisions dealing with the use of supplemental workers and the preservation of unit work. PNM asserts, in essence, that Local 611 failed to establish the relevance of the Larkin contract to the processing of the Powell grievance so it had no legal duty to furnish the Larkin contract. And, in effect, PNM believes that Lynch's offer to answer Local 611's questions about the Larkin contract suffices to meet any legal duty that it did have in this situation.

As conceded by the Acting General Counsel, the Larkin contract does not directly pertain to the employment conditions of the unit employees so it would not be information presumptively relevant information. Therefore, the Acting General Counsel or Local 611 had the burden of establishing the relevance of the Larkin contract to the processing of the Powell grievance, the specific incident that gave rise to the request. I have concluded that they failed to meet that burden.

The relevance burden is satisfied in these situations by showing that a logical foundation and a factual basis exist for such an information request. *Postal Service*, supra. That burden is satisfied by a showing that there is a probability the requested information is relevant and would be of use to a bargaining representative in carrying out its responsibilities. 310 NLRB 391, 391–392.

The essence of the Powell grievance amounts to Local 611's claim that PNM used a supplemental employee—Powell—for a longer period than permitted under the terms of the 2005–2009 agreement. It makes no apparent claim that PNM and Larkin engaged in some type of collusion or conspiracy to violate the

supplemental worker limitation period that Fitzgerald used in his August 7 email to justify his insistence that Local 611's entitlement to the Larkin contract. But even if one assumes the existence of collusion as to Powell, it is not at all clear that fact would add anything to the narrow and definite subject matter of this grievance, i.e., whether Powell's employment exceeded the 4-month contractual period without some form of consent by Local 611.

In this context, and in the complete absence of evidence of an on-going pattern of similar conduct in connection with the use of supplemental employees that would provide a basis for a reasonable person to suspect that the pattern resulted from collusion between PNM and Larkin seeking to undermine the employment of union represented workers, I cannot conclude that a "logical foundation or factual basis" exists for requiring the production of the Larkin contract in order to process the Powell grievance, a relatively routine dispute in the context of almost any collective-bargaining relationship. Accordingly, I find PNM did not violate Section 8(a)(5) by failing and refusing to furnish Local 611 with a copy of the Larkin contract in order to process the Powell grievance so I will recommend the dismissal of this allegation.

4. Complaint paragraphs 6(j)–(l) alleges that, since August 14, 2009, PNM failed to furnish all of the information Local 611 sought from May 1 onward to process its grievance charging that PNM used two supplemental workers in place of a regular employee on the coal pile at the San Juan Station.¹³

Relevant facts. This allegation involves a March 2008 grievance (SJ-08-15, the Archuleta grievance) about PNM's use of an individual, Tom Archuleta, provided by a local contractor named ESSI. Local 611 claimed that PNM used Archuleta to displace a regular full-time employee at the San Juan Station.

As explained by Fitzgerald, PNM had Archuleta "pushing coal on the coal piles at San Juan for quite a while, and our concern was they were alluding that he was a contractor." Local 611 believed that Archuleta was a supplemental employee rather than a contractor employee. He explained that a contract employee is supervised by the contractor while the supplemental employee is "coordinated" by PNM workers. And as previously noted, the collective-bargaining agreement fixes a time limit on the use of supplemental worker whereas no such limitation exists for workers employed by an outside contractor. (Tr. 937.)

In a May 2008 email to a PNM representative, Fitzgerald requested that PNM furnish the following information to Local 611 related to the Archuleta grievance: (1) a summary of the supplemental employee's job duties at the San Juan Station; (2) the days and worked by him from January 1 to the time of the response; (3) the person(s) who assigned the worker each of his

particular jobs: (4) a list of the safety instructions given to employee; (5) a copy of the contract between ESSI and PNM for the work he performed; (6) the on-site ESSI supervisor who directed employee's work and that supervisor's rate of pay; (7) the employee's pay rate including "any fringe or roll up costs"; (8) all instances where PNM personnel directed or coordinated the employee's work; and (9) all accident or incident reports involving the employee. (Jt. Exh. 13.) The complaint alleges that PNM violated Section 8(a)(5) since August 14, 2009, by its failure or refusal to furnish the information requested in items 4, 5, and 7.

For reasons unknown, this request languished unanswered for a considerable period. Finally, it was referred to Sonia Otero, an Albuquerque HR generalist temporarily assigned to assist personnel at the San Juan Station with a backlog of information requests. On June 29, 2009, soon after her assignment, Otero asked Fitzgerald to explain the relevance to the pending grievance of items 4 (the list of safety instructions), 5 (PNM's contract with ESSI), and the compensation information sought in item 7. (Jt. Exh. 89, p. 1.)

Fitzgerald responded by email the following day. The relevance of item 4, he explained, related to Local 611's belief that a unit employee had been utilized to train and provide safety instructions to the contract employee without being properly paid for doing this work. As to item 5, PNM's contract with ESSI, Fitzgerald argues that it could "lead to discovery of evidence relevant and necessary to show several facts including . . . the Companies [sic] intent as to who would coordinate his work, supervise this worker and insure that his safety was considered as well as requirements for training." As to item 7 of his original request, Fitzgerald simply told Otero that he was referring to "Tom Archuleta" (as she asked) but said nothing about the relevance of the supplemental employee's compensation package to the pending grievance.

After receiving and reviewing Fitzgerald's response with management officials, Otero ultimately provided PNM's formal response to the original information request in an August 14, 2009 letter. In that letter, Otero provided at least some information as to the first three items, declined to provide information sought in items 4 and 7 on relevance grounds, refused to provide the vendor contract with ESSI on ground that it was confidential and lacked relevance. Her response denied knowledge of the information sought in item 6, reported that the PNM did not maintain records of the information sought in item 8, and denied that that any accident, or incident, report existed as sought in item 9. In her August 14 letter, Otero referred to Archuleta as a "contract worker," and a "contractor worker," (Jt. Exh. 14, p. 2.)

When Fitzgerald responded to Otero's letter, he renewed Local 611's request for items "#3 and #6 as well as #5 and #9." His August 14 email to her goes on to state: "The contract that the company possesses should show who Tom would report to and how his job was laid out and for what work." (Jt. Exh. 15.) PNM never responded to his renewed request.

Argument and conclusions. The Acting General Counsel and the Charging Party contend that a genuine issue existed between the parties about Archuleta's status as a contract worker or a supplemental employee. Although Respondent's brief

¹³ The step 1 and 2 grievances, both filed by Karl Sours, a steward at the San Juan Station, are shown at Jt. Exhs. 88 and 65, respectively. The step 2 grievance largely tracks the step 1 grievance, which states:

On or about 3–24–08 and counting the company is using supplemental employees to displace permanent full time employees. The company is not paying the upgrade to employees supervising supplemental employees. Trying to gain through implementation (that) which they did not gain through negotiations.

appears to concede that Archuleta was a supplemental employee, that position appears inconsistent with the facts.

Thus, aside from Otero's actual characterization of Archuleta as a contract employee in her August 14 letter, other assertions in that letter strongly support the finding, which I have made, that PNM claimed, in response to Local 611's challenge about his employment, that Archuleta was *not* a supplemental employee. For example, Otero's assertion that Archuleta's compensation information lacked relevance is entirely consistent with the position that he was a contractor's employee, but it would be an entirely indefensible position if he was a supplemental employee. This is so because article 41 in the collective-bargaining agreement requires that the rate of pay of supplemental employees be consistent with the pay rates for unit employees.¹⁴ Hence, if Archuleta, in fact, was a supplemental employee, Otero's assertion that this information was not relevant would be logically indefensible.

Given the existence of the parties' dispute about Archuleta's status, I find the information sought in items 4, 5, and 7 of Fitzgerald's original request relevant to the issues presented by the Archuleta grievance. In addition, I find that PNM failed to justify the withholding of its contract with ESSI on the basis of its alleged confidential nature. The party asserting confidentiality has the burden of proving that such interests exist and that they outweigh its bargaining representatives need for the information. *Jacksonville Area Assn. for Retarded Citizens*, 316 NLRB 338, 340 (1995). In this case, PNM provided nothing more than a bare assertion that its vendor contracts in general, including the ESSI contract, contained confidential information and it made no effort to accommodate its confidentiality interests with Local 611's interest in obtaining information necessary to process a pending work preservation grievance. Accordingly, I find that PNM failed to sustain the burden it had of proving the confidential nature of the ESSI contract. In view of these conclusions, I find that PNM violated Section 8(a)(1) and (5) as alleged by failing to provide the information requested in items 4, 5, and 7 of Fitzgerald's original request for information concerning the Archuleta grievance.

5. Complaint paragraphs 6(m)–(o) alleges that PNM failed to furnish Local 611 with the information requested on May 20 and 26, 2009, showing the duties of James Martinez and Linda Hall.

Relevant facts. Following the conclusion of the negotiations for a new agreement in May 2009, an issue arose concerning the proper classification of three employees, all of whom seemingly performed some unit work as meter readers and bill collectors. One of the employees, James Martinez, stationed at PNM's satellite office in Las Vegas, New Mexico, had long

been classified as an "operations representative."¹⁵ On May 22, Local 611 filed a grievance seeking to have Martinez reclassified either as a senior meter reader or a collector. (Jt. Exh. 30.)

On May 26, Fitzgerald sent an email to Christa Belt and Ray Mathes alluding to a conversation they had on May 20 about the proper classification of employees. In his email Fitzgerald demanded that that PNM reclassify Martinez and Linda Hall as senior meter readers or collectors, both unit positions, and make them whole for any wages due. (Jt. Exh. 31.) Fitzgerald also claimed that the PNM officials purportedly agreed "to provide an answer to (the employees) current duties."

In the middle of June 2009, Tafoya complained in an email to Belt about her delay in providing Local 611 with an "answer." In the context of this email, reference to an answer is highly ambiguous. (Jt. Exh. 16.) It makes no reference to Fitzgerald's May 26 demand for "an answer." Belt credibly testified that on the basis of the May 20 conversation, the May 26 Fitzgerald email, and Tafoya's June 18 email, she interpreted the request for an "answer" to mean that Local 611 wanted PNM's answer to its demand that Martinez and the other employees be reclassified. (Tr. 452–453.) To this end, Belt sent settlement offers Local 611 regarding Hall and Carbajal in late June that served as a frame work for resolving their reclassification issues.

Later, on July 20, Belt transmitted PNM's proposal to settle the Martinez issue. (Jt. Exh. 32.) In this settlement offer, PNM proposed to reclassify Martinez as a meter reader but not at the highest meter reader classification. The offer was rejected on that ground. Subsequent communications between the parties over the Martinez matter amount to quibbling over whether the duties actually performed by Martinez based on his own account would be sufficient to warrant reclassification to the highest meter reader classification as he and Local 611 insisted. None of these subsequent exchanges make any reference to PNM's failure to provide requested information. To date, Martinez' reclassification has not been resolved. For this reason, the Acting General Counsel and Local 611 claim that his original May 22, 2009 grievance is still pending.

Argument and conclusions. The Acting General Counsel and Local 611 contend that the reference to an "answer" in Fitzgerald's May 26 email amounts to a written memorialization of an oral request for information referenced in paragraph 6(m) of the complaint. Respondent claims that Local 611 never made any type of request for information as described in complaint paragraph 6(m). I agree with Respondent's argument.

Local 611's other requests for information exhibit unambiguous demands that PNM provide it with information. Even assuming that some type of request for information had been made originally on May 20, the fact remains that there was a concurrent demand that PNM reclassify employees. There

¹⁴ The record evidence as a whole unquestionably merits the inference that Archuleta was essentially a heavy equipment operator. That inference strongly supports the conclusion that he would have been a "skilled" employee within the meaning of art. 41 as opposed to a "semi-skilled" employee. That being so, Archuleta's rate of pay would have been controlled by the collective-bargaining agreement and Local 611 would have unquestionably been entitled to his compensation information as a part of its legal duty as the exclusive bargaining representative to properly police the employer's application of the bargaining agreement.

¹⁵ Operations representatives are not unit employees. The other two employees involved in the early stages of this dispute, Linda Hall and Eddie Carbajal, had also been classified as operations representatives. For whatever reason, information related to Carbajal never figured in the complaint allegation. Regardless, PNM and Local 611 ultimately reached a settlement providing for the reclassification of Hall and Carbajal to unit positions. Tr. 305. In deference to the parties' negotiated accord, I have treated the complaint allegation as to Hall as moot.

followed from that situation Fitzgerald's email which failed to resolve the ambiguous use of the word "answer" and Tafoya's June 18 email bitterly complaining about the lack of an "answer" that was followed by an exchange of arguments related to a settlement proposal transmitted by Belt. I find these various communications after May 26 failed to convey any sense that the process had been frustrated by a lack of information requested by Local 611.

In view of these circumstances, I find that the obviously ambiguous requests for an "answer" contained in emails from Fitzgerald and Tafoya did not refer to a pending information request but rather referred to Local 611's demand that PNM answer their proposal to reclassify Martinez and the others. Accordingly, I find the Acting General Counsel failed to prove the allegations made in complaint paragraphs 6(m)–(o) by a preponderance of the evidence. Therefore, I will recommend the dismissal of these allegations.

6. Complaint paragraphs 6(p)–(r) alleges that PNM failed to provide a complete list of all meter readers and collectors (MRCs) as requested by the Union on June 15, 2009.

Relevant facts. On May 7, 2008, the Regional Director certified Local 611 as the exclusive representative "[a]ll meter readers . . . and all collectors" employed by PNM in the State of New Mexico (the MRC unit) following a stipulated election. (According to Mathes, Local 611 made no objection to the failure of PNM to include the names of Martinez, Hall, or Carbajal, on the list of eligible voters.) When the parties concluded the 2009–2012 collective-bargaining agreement, it contained an addendum related to the MRCs setting forth particular terms and conditions related to their classification. The agreement also contained a separate wage scale for the MRCs. That wage scale divided the collectors into two wage categories or classifications and the meter readers into four wage categories or classifications. (Jt. Exh. 5, p. 82.)

In support of this allegation, the Acting General Counsel and Local 611 rely on an email request of June 15, 2009, from Tafoya to Belt requesting that PNM furnish "a complete list of all collectors and meter readers including their current classification, hire dates and job dates." He asked that she forward that information "as quick as you can get it to us" and told her that they could then "work together to correct any problems." Two days later, JoAnn Garcia, a lead HR consultant working with Belt, sent Tafoya a 3-page list of PNM's collectors and meter readers, their wage category or classification, their "entry" dates, and their "start" dates. Admittedly, Tafoya never objected to the inadequacy of the information provided by Garcia.

On December 30, 2009, Tafoya submitted another related request to Belt asking that PNM furnish the names and classifications of all PNM employees "not currently in our bargaining unit" who read electric and gas meters, those who only read electric meters, and those who perform field collection work.¹⁶

Argument and conclusions. The Acting General Counsel and Local 611 argue that the June 15 request sought information as to all employees who actually performed MRC work

rather than just those classified as MRCs. PNM claims that it furnished Local 611 with exactly the information it requested. In support, PNM argues that Local 611 never objected to the inadequacy of information furnished.¹⁷

I agree with the with PNM's argument. The contention by Local 611 that Tafoya sought a list of anyone performing any kind of MRC work regardless of classification lacks support. This claim is severely undercut by Local 611's failure to object to the information PNM promptly furnished particularly where, as here, the information furnished made no reference to Martinez, Hall, or Carbajal, all employees whose inclusion in the MRC unit Local 611 was actively pursuing at that very time. Hence, their absence from the list furnished by Garcia should have been quite obvious. Furthermore, Tafoya's request in December vividly demonstrates Local 611's ability to frame an information request in a manner that would be the all encompassing request it has belatedly ascribed to its June 15 request. Accordingly, I am unable to find merit to the claim that the June 15 request sought information other than that which PNM furnished 2 days later. Therefore, I recommend the dismissal of this allegation.

7. Complaint paragraphs 6(s)–(u) alleges that Local 611 requested on July 31, 2009, the documentation relied upon by PNM for failing to comply with an OSHA regulation that deemed certain climbing equipment used by the linemen (belts, hooks, straps) to be personal protective equipment (PPE) and required that employers purchase such equipment for its employees engaged in that work.

Relevant facts. The OSHA issued the relevant PPE regulation that became effective in February 2008. Initially, PNM applied the requirements of the regulation only to employees hired after the effective date of the regulation, an interpretation consistent with that of the New Mexico Occupational Safety and Health Bureau (NMOSHB) at the time.

On July 31, 2009, Tafoya sent an email to Mathes, Belt, Nawman, and Joel Ivey calling attention to the PPE regulation and inquiring why PNM was not in compliance with the requirement that it pay for the PPE used by the linemen. He received no response. Tafoya followed up with an email on August 13, requesting that PNM furnish Local 611 by August 17 with "(a)ny and all documentation that the Company relies upon to not comply with the regulation." Tafoya sought this information because he assumed that PNM must be relying on some type of documentation for its failure to apply the regulation to all employees. He had never been told that PNM relied on any documentation other than the regulation itself. (Tr. 717.)

Having received no response to his August 13 email, Tafoya filed a complaint with NMOSHB sometime in late August or early September. At about the same time, Tafoya and Mathes engaged in a series of verbal and email exchanges and meetings over the linemen's equipment issue. In a September 22 email, Tafoya requested much more detailed information related to this issue that he carefully noted was "in addition to the request sent on 8/13/09." Specifically, this request sought the names and classifications of employees who had received reimburse-

¹⁶ This request is also the subject of a separate unfair labor practice allegation that will be considered below.

¹⁷ I am unable to locate any argument in the Acting General Counsel's brief related to this particular complaint allegation.

ments for PPE purchases, the manner in which the amounts were determined, the conditions imposed as a result of the reimbursements, and “(h)ow the Company determined who received ‘reimbursement.’” Mathes provided virtually all, if not all, of the information Tafoya sought at that time.¹⁸ As to the latter request, Mathes told Tafoya “(t)he employees who were reimbursed became linemen apprentices after May 15, 2008, when OSHA regulation 29 CFR 1910.132(h) required employers to provide the climbing gear as personal protective equipment.” (Jt. Exh. 95: pp. 2–3.)

In its initial response to his complaint, NMOSHB advised Tafoya that it, too, interpreted the regulation as applicable only to employees hired after the effective date of the PPE regulation. That led Tafoya to seek and obtain a clarifying interpretation from the Occupational Health and Safety Administration (OSHA) regional office in Texas to the effect that the regulation applied to all employees regardless of their date of hire. (Tr. 571–572.) This clarifying interpretation resulted in a site inspection conducted by NMOSHB and the issuance of a citation on October 23 by that agency for PNM’s failure to comply with the PPE regulation. (Jt. Exh. 96.) Subsequent to that, PNM and Local 611 negotiated a “Mutual Agreement” concerning the application of the PPE regulation at PNM which the appropriate unit employees ratified and the parties executed in early January 2010. (Jt. Exh. 97.)

Argument and conclusions. The Acting General Counsel argues that the relevance of the information Tafoya sought on August 13 has been established and that the “Union received no response from Respondent regarding the Union’s concerns that Respondent was not complying with this OSHA requirement.” Local 611 likewise asserts that the information requested on August 13 was never furnished and contends that if it had been, it might have insisted on a different agreement than that concluded in January 2010. PNM contends that Tafoya’s August 13 request was grounded on the assumption that PNM was not complying with the PPE regulation and, as it believed in good faith that it was in compliance, it had no information to furnish. PNM further argues that this request became moot after it concluded a settlement with NMOSHB and Local 611 over the payment of the PPE items.

I find that the Acting General Counsel to prove by a preponderance of the evidence that PNM failed to furnish the information Local 611 requested on August 13. On the contrary, Mathes responded to Tafoya’s final request of September 22—which essentially repeated the August 13 request—by informing him that PNM had relied on the PPE regulation itself. The Acting General Counsel makes no claim that PNM’s interpretation of the regulation was made in bad faith or was unreasonable. Indeed, a similar conclusion by the state agency with enforcement responsibilities of the regulation at issue forecloses any logical conclusion to that effect. This fact, coupled with an admittedly similar conclusion by NMOSHB, supports the inference I have made that Local 611 knew quite well the basis for

PNM’s interpretation of the PPE regulation. Accordingly, on the basis of the subsequent exchanges between Mathes and Tafoya, I am unable to conclude that a preponderance of the evidence shows that PNM failed to respond to this request.

But even assuming that PNM technically failed to respond specifically to the August 13 request, I agree with PNM’s contention that the request became moot, albeit not for the reasons it advanced, i.e., the subsequent January 2010 agreement of the parties. Instead, I find that this request became moot—or at the very least entirely irrelevant—when the OSHA regional office provided a definitive interpretation of the PPE regulation consistent with Local 611 position which NMOSHB applied in its subsequent investigation. No evidence shows that PNM contested the OSHA interpretation or did anything other than abandon its earlier, more-limited interpretation of the PPE regulation. Hence, the condition which even the Acting General Counsel agrees that motivated Local 611’s request in the first place simply ceased to exist altogether when PNM acquiesced in the more expansive interpretation of the PPE regulation provided by OSHA’s regional office. Accordingly, I will recommend dismissal of this allegation.

8. Complaint paragraphs 6(v)–(z) alleges that PNM unlawfully failed to provide Local 611 with information requested on August 6 and 26, 2009, concerning respiratory fit testing and its “clean-shaven” policy.

Relevant facts. PNM has maintained a detailed respiratory protection policy at the San Juan Station since 2007 or before. The policy purports to incorporate various regulations and guidance documents produced by OSHA, the National Institute for Occupational Safety and Health, and the American National Standards Institute. It details procedures designed to protect employees against “air contaminants and oxygen-deficient atmospheres.” (Jt. Exh. 37, Att. 5, pp. 1–22.)

Under the policy, employees must wear respirators in certain designated areas and may wear them in other areas if they chose. Employees assigned for work in areas where use is mandatory must first undergo a medical evaluation of their suitability for using a respirator administered by a medical professional and a fit test of the assigned device. Once performed, these tests must be repeated every year thereafter as long as the employee works in a mandatory-use area. Employees who choose to voluntarily wear a respirator in other areas must also undergo the medical evaluation but are not required to take a fit test. (Jt. Exh. 37, Att. 5, pp. 2–3.)

The policy limits the wearing of facial hair that might interfere with the seal of the respirator to the face or that interferes with the operation of the respirator valve. The policy also provides that employees with facial hair that impairs the seal or the valve operation “shall shave the facial hair in question before being allowed to use the respirator.” (Jt. Exh. 37, Att. 5, p. 7; Tr. 1028.) Generally, PNM specifies this facial hair standard when an outside vendor conducts the periodic fit tests. (Tr. 1010–1011.) Under the policy, employees required to wear respirators need not be totally “clean-shaven.”

The parties’ collective-bargaining agreement provides for the establishment of general safety committees at various locations. They are joint labor-management committees that address safety questions and adopt the employee safety rules. The general

¹⁸ I find it reasonable to infer that the Acting General Counsel did not include any allegations about the additional information requests of September 22 because Mathes provided all, or substantially all, of the information Tafoya requested.

safety committee must approve all changes to PNM's Employee safety manual.

The San Juan Respiratory Protection Program is consistent with rules established under the jointly negotiated employee safety manual. In particular, section XI of the safety manual "Requirements for all Respiratory Protection" provides as follows:

c. Facial characteristics such as scars, unusual skull shapes, facial hair, etc., may prevent an employee from obtaining an effective seal. Employees required to wear respirators shall be able to satisfactorily pass the facial seal test specified in the facility Respiratory Protection program.

(GC Exh. 7, sec. XI,A,1,1c.)

The joint safety committees meet quarterly or on-call as specified in the bargaining agreement. The minutes of San Juan Plant's General Safety Committee for July 30, 2009, show that former San Juan Plant Manager Jim McNichol addressed the committee about several matters. He informed the committee that the past practice of voluntary compliance with the plant's pulmonary and respiratory equipment fit-testing program would end and that the program would become "mandatory" in the next couple of months with a goal of completing all fit tests "by (the) end of September." McNichol also stated that "[a]ll employees being fitted for any respiratory equipment must be clean-shaven to get a proper fit." He acknowledged there would be "issues" about this requirement but added that "management and the safety team . . . will do whatever is necessary to administer it and enforce it."¹⁹ (Jt. Exh. 35, p. 1.)

The clean-shaven comment sparked an immediate controversy that resulted in a number of internal email exchanges that involved McNichol, John Haarlow, the head of the San Juan safety department, Michael Walls, one of Haarlow's staffers, Ginger Lynch from the labor relations department, and others. (GC Exh. 13.) At the end of this email string McNichol wrote the following to Harlow and Walls:

Yep, I probably should have elaborated on the clean shaven comment. I knew what I meant! Obviously, what is required is for the respirator to fit properly, thus hair on the face affecting the sealing surface is the issue. That is basically it, as you know. Limited facial hair or even full beards between fit tests or occasions when an employee needs to wear a properly sealing respirator are not an issue.

On August 1, Local 611 Representative Fitzgerald emailed Ginger Lynch claiming that McNichol's disclosures about the fit testing program and the clean-shaven requirement at the meeting the day before amounted to a unilateral change. He requested that she furnish him with a copy of the program and "cease and desist" with its implementation without first bargaining with Local 611 over the matter. He also asked for the date of the planned implementation of the program and the

"new clean shaven requirements" along with the "resultant actions" in case of noncompliance. (Jt. Exh. 36, p. 2.)

Lynch responded August 5 email, furnishing Fitzgerald with a copy of PNM's respiratory protection program for the San Juan Station. Lynch also claimed that, under Federal law, the fit tests were a mandatory procedure for "all employees who may wear respirators." She also went on to assert that the "federally-required 'fit tests' specifically prohibit 'any hair growth' between the skin and the facepiece sealing surface of the respirator." Any disciplinary action required to enforce compliance, she said, would be in accord with a "Positive Discipline" policy incorporated in the parties' bargaining agreement. Finally, Lynch rejected Fitzgerald's request for bargaining on the ground that PNM "is obligated to comply with OSHA" and therefore bargaining over "whether to comply with federal law is an illegal subject of bargaining." (Jt. Exh. 37.)

Michael Walls, a senior safety consultant at the San Juan facility, claimed there was no attempt in 2009 to change the existing program. Although he could not recall precisely when he talked with Fitzgerald about McNichol's "clean-shaven" remarks, he recalled telling the union agent that the issue amounted to "a misunderstanding or miscommunication of what clean-shaven means." (Tr. 1008-1009.) Mathes, Lynch's supervisor at the time, also claimed that a "misunderstanding" arose from McNichol's use of the words "clean shaven" at the July 30 safety meeting that Lynch's August 5 email attempted to clarify by making the point that they meant only as stated in the existing, written program. (Tr. 280.)

In emails from Fitzgerald to Lynch dated August 6 and 18, Fitzgerald continued to reference McNichol's "clean-shaven" remark at the July 30 safety committee meeting. He insisted that PNM rescind McNichol's threat to enforce "a clean shaven policy."

On August 25, PNM sent a high-priority email notice to various crew supervisors (13 in all) instructing them to send their employees for the pulmonary function and respirator fit tests on the dates listed if the employee was not "current" on those tests. The email also notified the supervisors that "(b)ottom line, we need to be complete by October 30."

Fitzgerald obtained a copy of the email and sent a request to Lynch the following day, August 26, seeking this following information:

- What will happen if an employee is unsuccessful in passing his/her fit test?
- Will being fit test be a new requirement of a job or jobs? Does the Company intend to use being fit tested as a reason to bypass employees for overtime on certain jobs?
- Will all employees be required to fit test even though they may or may not wear respirators in their current duties?
- Since the Company has chosen to start this on August 31, 2009 is this the implementation date?
- Has each of these employees been evaluated in accordance with OSHA requirements?

¹⁹ McNichol did not testify. The statements attributed to him in the committee's minutes are not disputed. Labor Relations Manager Mathes admitted that he had heard about McNichol's "clean-shaven" remark and said, "the effect was that folks were agitated about (it)."

- Will employees be advised as to how they will comply while in equipment such as ARC flash hoods?

Fitzgerald insisted that he be provided answers by August 28. In addition, the request insisted that PNM rescind its respirator-fit-test program to the extent that it had implemented one until it bargained with Local 611 over this subject. (Jt. Exh. 39.)

Lynch emailed PNM's response on September 8. In it, she set out the "implementation timeline" for the testing identical to that contained in the August 25 notice to PNM's supervisors. She added that the company's goal was to finish the testing by the "end of October 2009" and went on to state "[w]e cannot speculate about what the consequences of an employee's failing to comply with the OSHA-mandated tests because the reasons for the failure and other circumstance are important" but if the employee failed the test simply because he refused to shave "the employee may be subject to the disciplinary process . . . (in) the collective bargaining agreement." She concluded her email by stating that the "Company has identified appropriate respiratory equipment for use in the ARC flash hoods."

Within an hour Fitzgerald responded claiming that she had not answered all of his questions, namely, whether employees not required to wear respirators would be fit tested; whether a fit test would be a requirement of a job or jobs; and whether the PNM would use fit-testing as a reason to bypass employees for overtime.

At the hearing, Fitzgerald remained equally adamant, claiming that Lynch never responded to his inquiries about what would happen to an employee if he/she failed a fit test. That led to this exchange between PNM's counsel and Fitzgerald:

Q. Okay. It wouldn't matter if it was because they refused to shave a full beard versus they had some kind of facial abnormality?

A. I believe all those things could have been covered in an answer. We'll make accommodations; we'll try different respirators; we'll—I'm basically asking, what happens if they are unsuccessful. If it's a medical condition—they should know all that. It's their policy.

Q. So you think they should know all the possible circumstances that an employee could fail a fit test and then give you what would happen with respect to all of those. That's right?

A. I believe they should be able to. Yes.

(Tr. 1077.)

No evidence establishes that any employee received discipline for failing or refusing to be "clean shaven" for a fit test. Fitzgerald admitted that at least some employees with facial hair completed the fit testing requirement. (Tr. 1074.)

Argument and conclusions. The Acting General Counsel's brief advances very narrow arguments. First, he asserts only that the Union, on August 18, requested "a copy of the clean-shaven policy that . . . McNichol promulgated . . . on July 30, 2009," and that PNM has not provided that policy. Next, the Acting General Counsel argues that PNM "has not sufficiently responded" to Local 611's inquiry as to what would happen if an employee failed a fit test. This information, the Acting General Counsel argues, is presumptively relevant because it relates

to the health and safety of employees, a term and condition of employment. Local 611 acknowledges receipt of a copy of Respiratory Protection Program at the San Juan Station "but not any policy or program "mandating fit testing or requiring employees to be clean shaven." (Local 611 Br., p. 22.)

Respondent contends that McNichol did not intend to announce any "clean-shaven" requirement beyond the respiratory protection program's prohibition against hair that interfered with the fit or function of the respirator, and that PNM never had any other "clean-shaven" policy. It contends that it furnished all relevant information Fitzgerald sought about the respiratory protection program. However, it contends that Fitzgerald never sought a copy of the "clean-shaven" policy as alleged in the complaint and, even if he had, PNM had no responsive information because such a policy never existed. PNM claims that it had no duty to furnish other information sought by Fitzgerald because it related to OSHA requirements or merely sought to bait the company into admitting violations of the parties' collective-bargaining agreement or its bargaining obligations.

After careful consideration of the foregoing, I find that McNichol's inarticulate statement on July 30 amounted to nothing more than an announcement that the respiratory protection program would become mandatory. There is no allegation that this action violated the Act. The preponderance of the evidence clearly establishes that PNM never, at any time, established a so-called "clean-shaven" policy as alleged in complaint paragraph 6(v). Hence, I find that despite Fitzgerald's repeated insistence that it do so, PNM had no legal duty to furnish information about a nonexistent "clean shaven" policy.

I further find that PNM provided Local 611 with the information sought on August 26 to the extent that it was legally obliged to do. In this connection, Fitzgerald's insistence that PNM articulate the type of discipline that might be imposed amounted to nothing more than a demand that the Company speculate about a myriad of potential causes for a failure and determine in advance an endless list of penalties. I find PNM had no legal obligation to engage in this type of speculation. Having concluded that Respondent provided all of the information it was legally obliged to provide, I recommend dismissal of these allegations.

The closely related allegation by the Acting General Counsel in **complaint paragraphs 7(b), (h), and (g)** that PNM violated the Act by unilaterally implementing a mandatory pulmonary and fit testing program requiring that employees be clean-shaven also lacks merit. At previously found, PNM never instituted a clean-shaven requirement. Additionally, PNM correctly notes that the pulmonary and fit testing requirements are mandated by OSHA. Finally, the employee safety manual jointly negotiated by the parties also requires such testing in accord with the "facility Respiratory Protection program." This safety manual provision, and the lack of any testimony or other evidence from the safety committee members who participated in its negotiation, strongly supports the inference I have made that the contractually established joint committee considered the testing requirements and negotiated fully in connection with that subject. Accordingly, I find the Acting General Counsel failed to prove any unlawful unilateral action as alleged in

complaint paragraphs 7(b), (h) and (g). For this reason, I also recommend dismissal of those related allegations.

9. Complaint paragraphs 6(aa)–(cc) alleges that PNM failed and refused to furnish Local 611 with the following information sought on October 1, 2009, related to the discharge grievances of Everand Silas and Guy Claw:

Any and all documentation that [the Respondent] used or considered that it had not previously supplied concerning the grievances SJ-09-07 [Silas] and SJ-09-08 [Claw], including any and all notes taken that were used in determining the terminations at issue in grievances SJ-09-07 and SJ-09-08.

Relevant facts. Claw and Silas, two mechanics who worked in the maintenance department at the San Juan Station until February 2009, were fired by their department manager, Mathew Zersen, for violating PNM's rules against jobsite violence.

Following a report of an altercation between Claw and Silas, Labor Relations Supervisor Ginger Lynch and Supervisor Jim Cash conducted fact-finding interviews with both employees. A union steward and Zersen sat in on these interviews as well as the interview of a contractor's employee who purportedly witnessed the altercation conducted later that day.

Following the fact-finding interviews, Claw and Silas were suspended with pay pending a disciplinary determination by management. Zersen, Cash, and Lynch then reviewed the incident and concluded that both employees failed to follow PNM's policies prohibiting workplace violence. At the end of their discussion, and after speaking with PNM's legal department, Zersen decided to discharge both employees. He instructed Lynch to prepare a discharge recommendation for both employees and said that he would clear his decision with the plant manager. Zersen credibly testified that did not take notes at the fact-finding interviews or review the notes of anyone else prior to making his decision. He also had no recollection of having seen the written discharge recommendations Lynch prepared at his direction and submitted to Anna Ortiz, the director of HR services. Regardless, those two documents would have been generated by Lynch after Zersen decided to discharge the two employees.

After their discharges, Local 611 promptly filed grievances on the behalf of Claw and Silas. At the first-step grievance meeting in March, PNM provided Local 611 with copies of Lynch's written discharge recommendations. The copies provided contain a redaction of the factual version of the events Lynch submitted to Ortiz. In place of the redacted material, the copies provided Local 611 contain a summary of the facts as determined by PNM representatives following their fact-finding interviews. (CP Exhs. 12 and 13.) Local 611 requested an unredacted copy as well as any notes take by company representatives at the fact-finding interviews. A few days later, PNM denied the union's request for unredacted copies of Lynch's recommendations and the notes she took at the interviews. At second step grievance meetings held on September 29 and 30, Local 611 reiterated its request for the unredacted copies and for management's notes previously sought. On October 1, Fitzgerald emailed a follow up request to Lynch. Fitzgerald testified that he wanted to know what the deci-

sionmakers had in front of them when they decided to terminate Claw and Silas. (Tr. 1078.)

In addition to seeking unredacted copies of Lynch's discharge recommendations, Fitzgerald's October 1 request specifically sought any notes taken by management personnel present at the predischarge interviews, and some incidental training materials pertaining to Silas. Lynch responded on October 27. She supplied the training materials ordinarily used but not unredacted copies of her discharge recommendations or the notes taken by management personnel at the fact-finding interviews. Her letter stated that the PNM maintained the same position it initially took with respect to the notes and the unredacted recommendations in late March. As to management's notes, she specifically declined to furnish that information because a union steward took notes at the interviews of the discharged employees and the outside witness. Fitzgerald responded on November 4, charging that Lynch had not furnished any of the requested information, including even the training information because PNM had failed to provide documentation about the materials used on the specific day that Silas received the disputed training. Fitzgerald claimed that the grievances are stymied by PNM's refusal to furnish this information.

Argument and conclusions. The Acting General Counsel, asserting that PNM "relied heavily on the notes it had taken of the employee interviews" supports the Union's claim that those notes as well as unredacted copies of Lynch's discharge recommendations are necessary and relevant to the determination as to whether to process the Claw and Silas grievances. The Acting General Counsel asserts that the mere fact that a union steward was present for the interviews is not a defense to the refusal to furnish the requested documents.

Respondent claims that this is "another instance where the Company had no information responsive to the [Union's request for information] as phrased" because Zersen made the decision and did not rely on Lynch's memos or anyone's notes.

At least as to Lynch's written termination recommendation, I find Respondent's defense lacks merit. Over a period of months following receipt of the redacted copy of Lynch's memo, Local 611 made several requests for unredacted copy but PNM never provided it. The actual reason PNM withheld the full memo has not been clearly explained apart from its assertion that Zersen did not rely on it when making the decision to discharge the two employees. Although that may well be true in a narrow sense, the evidence merits the inference that the memo amounts to a summary of the considerations that Zersen, Lynch, and Cash discussed jointly and with some unidentified person or persons in PNM's legal department following the interviews of the two employees and the witness.

For this reason, and as Zersen directed Lynch to prepare the recommendation memos, it is fair to conclude that the basis for his decision to terminate the two employees would likely be imbedded in the memos Lynch ultimately prepared. Therefore, I find the complete documents would be relevant and useful to Local 611 in evaluating the merits of the grievances it filed concerning the discharges. These unredacted memos, in my view, are analogous to the security officers' reports in *New Jersey Bell Telephone Co.*, 300 NLRB 42 (1990), that the Board required the company to produce to the bargaining repre-

sentative to assist it in evaluating a discharge grievance. Accordingly, I find *New Jersey Bell* controls the result here and conclude that PNM violated Section 8(a)(1) and (5) by failing to provide Local 611 with the unredacted copies of Lynch's termination recommendations as requested.

The notes taken by Lynch during the witness interviews are another matter. As Local 611 had an official representative present during all of the interviews, it had equal access to the same raw information available to PNM by reason of Lynch's presence at the interviews. The only additional information likely available in Lynch's notes would be conclusions she may have made by reason of the mental impressions gained during the interviews. As it is likely that she discussed the impressions recorded in her notes during the postinterview exchange she had with Zersen, Cash, and the Company's legal department, I find such information would also fall within the scope of Local 611's request. However, Local 611 had the same or similar information available to it as the result of the steward's presence at the interviews, a fact that Lynch pointed out to Fitzgerald in refusing to provide her notes. Although PNM did not advance a claim of work product privilege in its brief with respect to Lynch's notes, I find the basis for her refusal to produce her notes in response to several requests by Fitzgerald tantamount to the assertion of a work product privilege. Based on the Board's decision in *Central Telephone Co. of Texas*, 343 NLRB 987 (2004), I have concluded that Lynch's notes constituted privileged work product and that PNM did not violate the Act by refusing to produce them as requested by Local 611.

b. Complaint in Case 28–CA–22997

10. Complaint paragraphs 6(a), (d), and (e), as amended (see GC Exh. 2), alleges that since March 26, 2010, PNM refused to furnish Local 611 with the information it sought concerning the duties other than meter reading and collection work performed by six individuals, namely, Christopher Bustamante, Jason Montoya, Chris Padilla, Felix Munoz, Steve Bertuca, and Michael Varela.

Relevant facts. Following an election concluded on April 28, 2008, pursuant to a stipulated election agreement, the NLRB certified Local 611 as the exclusive representative for the following employees: All meter readers, who regularly read only electric meters or both electric and gas meters, and all collectors employed by [PNM] in the State of New Mexico. The stipulated unit excluded these employees: All meter readers who regularly read only gas meters, all employees currently represented in an existing bargaining unit, all administrative, production, maintenance, construction, and managerial employees, office employees who do not regularly work in the field, office clerical employees, guards and supervisors as defined in the Act.

After its certification, Local 611 requested extensive information concerning bargaining unit employees that PNM presumably provided. (Jt. Exh. 41.) Thereafter, the parties negotiated special terms applicable to this new unit and agreed otherwise to apply the terms of their existing collective-bargaining agreement to the meter readers and collectors unit in a manner that suggests the merger of the new unit with the existing unit. (See GC Exh. 5.)

By the end of 2009, a dispute sprouted over the classification of some nonunit employees working in outlying areas who performed meter reading and collection work. On December 30, 2009, Tafoya submitted a written request to Crista Belt, a PNM labor relations representative, seeking the following information:

- The names and classifications of all PNM employees that read electric and gas or electric only meters who are not currently in our bargaining unit.
- The number of days a week they read meters to include check reads.
- The number of hours a day they read meters to include check reads.
- The rates of pay for those identified.
- The names and classifications of all PNM employees who perform field collections, disconnects for non-payment, and delivery of two day notices.
- The number of days they perform field collections, disconnects for nonpayment, and delivery of two day notices.
- The number of hours a day they perform field collections, disconnects for non-payment, and delivery of two day notices.
- The rates of pay for those identified.

(Jt. Exh. 93.) Ray Mathes, PNM's labor relations manager, responded to Tafoya's request on January 22, 2010, by providing all of the information requested above save for the wage rate information. He specifically noted the named employees engaged in meter reading and collection work "among their other duties." The information provided did not show that the employees performed meter reading or collection work, or a combination of the two, on a full-time basis.²⁰ (Jt. Exh. 48, pp. 3–4.)

Mathes named 10 persons who read "electric and gas or electric only" meters. He named six persons who performed "field collections, disconnects for non-payment, and delivery of two day notices." Five in the latter group were also included in the former group.

On February 15, a union steward filed a grievance alleging that PNM failed to properly classify coordinators' Bustamante, Montoya, Padilla, Munoz, Bertuca, Varela, and two others, James Martinez and Isidro Medina, as senior meter readers or collectors under the terms of the parties' bargaining agreement.²¹ PNM denied the grievance on February 22 on the

²⁰ As a preface to providing the information, Mathes charged that, as the information sought pertained to individuals outside the bargaining unit, the Union had the obligation to establish relevance but had failed to do so. And, as to one individual, James Martinez, Mathes further objected on the ground that the Union's request amounted to inappropriate discovery inasmuch as the Union had recently filed an NLRB charge on his behalf. Jt. Exh. 48, pp. 1–2.

²¹ In his January 22 response, Mathes identified Bustamante, Montoya, and Varela as customer service coordinators, and Bertuca, Montoya, and Padilla as meter reader coordinators. However, he identified Martinez as an operations representative, and Medina as a supervisor. Regardless, the Union's grievances lump Martinez and Medina together with the others classified by PNM as coordinators. See Jt. Exhs. 49, 50.

ground that the named employees could not avail themselves to the grievance procedure. (Jt. Exh. 49.)

On March 26, Tafoya requested that PNM provide Local 611 with the job descriptions for the coordinators involved as well as a list of the “other duties” performed by the coordinators that company representatives mentioned during a recent grievance meeting and that Mathes alluded to in his January 22 letter. (Jt. Exh. 51.) In his April 2 response, Mathes provided the job descriptions Tafoya requested but asked him to explain the relevance of his request for the added information concerning the coordinators’ “other duties.” (Jt. Exhs. 52 and 53.)

In an April 7 letter to Mathes, Tafoya reiterated his request that PNM enumerate the coordinators’ “other duties” that PNM representatives repeatedly cited. (Jt. Exh. 56.) Apart from the duties detailed in the coordinators’ job descriptions it provided to the Union, PNM has not responded to this repeated request.

Argument and conclusions. The Acting General Counsel and Local 611 argue that PNM violated Section 8(a)(5) by failing to provide the Union with necessary and relevant information it requested in connection with processing the grievances it filed regarding the proper unit placement of the so-called coordinators.

PNM tacitly acknowledges that it never provided Local 611 with any specific information about the “other duties” its coordinators perform. However, it argues that the Union “did not come close to satisfying its burden of demonstrating a reasonable belief, supported by objective evidence, that information about other duties performed by nonunit employees was relevant.”

PNM’s argument lacks merit. Mathes’ initial response on this subject identifying certain individuals who perform meter reading and collection work together with the subsequent grievances filed by the Union plainly establish the relevance of the “other duties” information. Recently, in *Piggly Wiggly Midwest, LLC*, 357 NLRB 2344 (2012), the Board observed: “Where the factual basis of a request for nonunit information is obvious from all the surrounding circumstances, the union’s failure to spell it out will not absolve the employer of its obligations under the Act.” Hence, even though the Union may have failed to articulate the relevance of its request for information about the “other duties” of the coordinators (and the other two, Martinez and Medina) in its correspondence with the Company, the extant circumstances plainly establish the relevance of this information on its face. If for no other reason, such information would be essential to assessing whether the meter reading or collection work performed by the disputed individuals amounted to an incidental or predominate part of their work, or something in between. As I have concluded that this information is relevant and necessary to the Union’s representative functions, particularly as it pertains to the preservation of unit work, I find Respondent violated Section 8(a)(1) and (5) by refusing to provide it.

11. Complaint paragraphs 6(c), (d), and (g) alleges that PNM has failed and refused to furnish Local 611 with information requested on February 12, 2010, as to the basis for including employees on PNM’s “cyber security” list and the factors used for making those determinations.

Relevant facts. PNM is regulated by the Federal Energy Regulatory Commission (FERC). FERC regulations required that electric utilities such as PNM comply with the FERC-approved Critical Infrastructure Protection Standards (CIP) that governs the security of the nation’s bulk electric system. One CIP standard requires an electric utility to identify critical cyber assets, i.e., those cyber assets whose function is essential to the reliable delivery of a vital business process.²² Another CIP standard requires that each utility company employee with unescorted physical access to critical cyber assets must undergo an appropriate personnel risk assessment (PRA) and security awareness training. This standard requires the utility company to maintain and utilize a documented PRA program before granting an employee access to critical cyber assets. At a minimum, the utility’s PRA program must include a suitable form of identity verification and a 7-year criminal background check. Covered employees must undergo a PRA at least every 7 years after their initial assessment. (GC Exh. 4, pp. 2–3.) The underlying goal of the PRA is to mitigate threats to the national electric grid by ensuring that only trustworthy and reliable personnel have unescorted access to a utility’s facilities, functions or information. Suffice it to say that the mandated cyber security regulations address matters of grave importance to national security. At the same time, compliance with FERC’s regulations necessitates serious intrusions into employee privacy. In the context of the kind of the largely unconstructive labor relations relationship present here, the tension between the heightened national security needs imposed on PNM and the understandable resistance to intrusions on personal privacy become exaggerated and ugly.

During the negotiations for the 2009 agreement, the parties could not agree on changes related to PNM’s existing cyber security, workplace violence, and driving under the influence policies. Rather than delay the resolution of other contract terms, the parties agreed to continue negotiations over these policies for a limited period and then submit any unresolved issues for final and binding interest arbitration. By September 2009, the parties had been unable to resolve their differences over the cyber security policy so that matter was submitted to Arbitrator Marshall A. Snider for resolution. After 3 days of hearing, Arbitrator Snider issued a 14-page decision that analyzed and resolved the parties’ arguments concerning the cyber security policy. He appended to his decision the 6-page cyber security policy he drafted that incorporated the conclusions he reached in his decision. (GC Exh. 4.)

The cyber security policy formulated by the Arbitrator Snider contained the following salient features relevant here: (1) the assets covered by the policy would be determined at the Company’s discretion; and (2) the employees covered by the policy would be determined at the discretion of the Company based on relevant standards set forth in his decision. He recognized the possibility that an employee might not qualify for access to cyber secure areas based on the PRA and that this could result

²² In the context used here, a cyber asset is defined as electronic devices used to create, store or process data, communication systems that transmit information electronically, and hardware or software systems that support these functions.

in the employee's termination absent some other suitable solution. Related to that possibility, Arbitrator Snider specifically rejected "the Union's proposal for a joint committee to set disqualification criteria and in some cases to decide whether to grant access (to cyber secure zones)." He gave these reasons for rejecting this proposal:

First, the Company is the sole entity responsible for cyber security under the CIP standards. Second, it is not feasible to develop a comprehensive set of disqualifying criteria; unless such decisions can be made on a case by case basis, some employees who should be denied access may not be covered by the criteria and others may be denied access when it is unnecessary to do so. No set of criteria could anticipate every situation or how a particular piece of information in an employee's background should affect a particular individual or position. *In addition, the evidence established that the joint committee construct is likely to result in delay or deadlock.* [Emphasis added.]

(GC Exh. 4, pp. 9–10.) Ultimately, an employee who fails a PRA could be moved to another, perhaps lower paying job, or even be terminated. Any resulting adverse action, the arbitrator ruled, would be subject to the contractual grievance-arbitration provision.

Mick Oldham, a senior labor relations representative for PNM, notified Fitzgerald and Tafoya by email on February 2, 2010, that the Company would commence implementation of the cyber security policy during the week of February 8. (Jt. Exh. 58.) Over the course of the next 4 or 5 weeks, Fitzgerald sought certain information in a series of email exchanges with Oldham about the employees designated by PNM as having access to cyber-secure areas and, hence, subject to a PRA that provide the basis for this complaint allegation.

In his initial request to Oldham, Fitzgerald asked to be provided with the names and classifications of those employees designated as PRA eligible as well as a "statement from the Company as to why the Company has determined each employee has a reasonable connection to Cyber Security." (Jt. Exh. 58, Shannon Fitzgerald email string, p. 4.) In response to this specific request, Oldham responded by furnishing a list of the bargaining unit employees selected under the policy and provided this further response as to the basis for the selections:

With regard to your request concerning the company's determination of the employees' connection to cyber security, these determinations were made in accordance with the provisions of the arbitration award.

I suggest the union review the attached list first, and then if there are concerns regarding specific determinations, to provide the company with the basis of such concerns and we will certainly be willing to discuss that with you.

(Id., p. 3.)

In reply, Fitzgerald charged that "[i]t looks like the determination was made by classification and as broad as possible, and not as per the policy" and that most had only isolated instances of access to cyber assets or cyber secure areas. He then requested a list of the cyber secure areas the Company had designated and then stated, "I must insist that the Company show

how the determinations were made." Fitzgerald also questioned the inclusion of a specific employee named Royer. (Id., p. 3.)

Oldham responded by providing a list of the designated areas and by continuing to insist that the Company had made its determinations in accord with the arbitration award. He also informed Fitzgerald that the list of covered unit employees was undergoing revision and that the Union would be provided with the revised list that would include those designated as "critical." As to Royer, Oldham told Fitzgerald that he had been included because he was "the only Area Rep assigned to San Juan and therefore the only employee in that classification determined to be covered under the policy at this time." (Id., p. 2.)

Fitzgerald replied with the continued charge that the Company had not complied with the Union's information request and added charges that it had "arbitrarily" designated classifications as cover under the policy even though they have only isolated access to cyber secure areas. He went on to demand information as to when in the past 12 months certain specific employees had access to covered areas. After disputing that Royer would have more than isolated access to a cyber secure area, Fitzgerald asserted:

I must insist that you quit playing games and stalling and provide the full request for information as to what factors have been used as well as an explanation as to how all these employees on the Company list were deemed by the Company to be covered employees, and what factors were used for the Company determinations so that I may individually determine if the Union agrees with the determination or if the Company arbitrarily and capriciously applied this policy to its members. As the Company has already issued the releases and employees are required to return them in 72 working hours you can see how this information would be required immediately so if there is disagreement the employee is not wrongly subjected to an unsubstantiated and intrusive background check.

(Id., pp. 1–2.)

Oldham's reply joined the issue presented for decision here. He told Fitzgerald that the arbitrator's decision "gives management the discretion to determine what classifications of employees are subject to the Cyber Security policy. Your questions are designed to require management to justify its decision to you and this is not an appropriate use of a request for information." Yet, in response, Fitzgerald, under the guise of investigating a grievance, continued to insist that the Union be furnished with the basis for why the Company selected each employee as a covered employee and what access they have to cyber secure areas. (Jt. Exh. 61, pp. 1–2.) Concededly, the Company never furnished the Union with the reasons it had for selecting each individual employee it ultimately determined to be covered by the cyber security policy.²³ Instead, it provided a general explanation of the various factors it applied when con-

²³ According to Oldham, these determinations were made in a series of management meetings without any written record of the specific factors used by the decisionmakers in deciding that the requirements of the cyber security policy applied to particular individuals.

sidering whether or not an employee was covered. (Jt. Exh. 62, pp. 1–2.) These factors essentially tracked those identified by the arbitrator as relevant.

Later, in a February 26 email, Fitzgerald returned to Royer’s specific situation and asked Oldham to explain what cyber security access this employee had and how it was more than isolated. Specifically he asked for a list showing when and where Royer had access to protected areas in the last 6 months. (Jt. Exh. 62, p. 2.) Although Oldham subsequently responded to this request by identifying the covered locations where Royer might be assigned, he did not provide information showing his access to the specified areas in the last 6 months as requested. (Jt. Exh. 62, p. 1.)

Argument and conclusions. The Acting General Counsel and the Union contend that PNM violated Section 8(a)(5) by failing to provide the Union with the specific rationale it used in determining that an employee was covered by the requirements of the cyber security policy and for its failure to provide the information requested about Royer’s access to cyber secure areas in the past 6 months. PNM argues that (1) based on the arbitrator’s decision granting it the discretion to make coverage decisions, it had no duty to explain its basis for applying the cyber security policy to any particular employee; (2) the Union actually abandoned its original request for this information, (3) no written record exists showing factors used in making individual coverage decisions; and (4) the request was unduly burdensome inasmuch as more than 300 employees were involved.

Contrary to Respondent’s argument, I find Fitzgerald never abandoned his demand that the Company provided a detailed explanation for designating particular employees as subject to the cyber security policy or its demand that it justify its determination with respect to Royer. I find, however, that the Company had no duty to provide this information in the peculiar circumstance of this case.

In my judgment, the arguments advanced in the briefs submitted by the Acting General Counsel and the Union fail to give sufficient deference to the careful determinations made by Arbitrator Snider. Instead, their analysis effectively treats the arbitrator’s decision as though it did not exist, cites standard cases concerning the duty to furnish information, and argues that a violation plainly occurred. I profoundly disagree with their approach and refuse to adopt it.

The parties agreed to abide by Arbitrator Snider’s decision as final and binding. Enforcing Fitzgerald’s demands that the Company provide the Union with a declaration of each factor it relied on in determining that each employee would be subject to the requirements of the cyber security policy drafted by the arbitrator would simply eviscerate the arbitrator’s decision and the parties’ agreement to abide by it. Although the Board’s seminal decisions in *Spielberg* and *Collyer*²⁴ do not apply here, the fundamental policies expressed in those decisions provide instructive guidance for resolving this unusual issue.

Arbitrator Snider carefully rationalized the basis for his conclusion that the Company should be vested with the discretion to determine those employees who would be covered by this

critical policy. In addition, he rejected a proposal to establish a “joint committee” to determine the disqualifying criteria flowing from an unsatisfactory PRA, in part, based on his conclusion that it would get mired down in endless disputes. There could be no greater support for the wisdom of this specific conclusion by Arbitrator Snider than my own lengthy, tedious, and time-consuming decision in this case. Reading his decision as a whole, I find that as to the narrow subject matter pertaining to the mandatory cyber security policy, the arbitrator established a scheme that allowed the Company to act unilaterally in making all preliminary determinations but the Union would be at liberty to grieve any adverse actions that resulted. As the parties chose to utilize interest arbitration, the scheme established by the arbitrator became a part of the parties’ collective-bargaining agreement as though they negotiated it themselves.

The requests here occurred in the absence of any adverse action. In my judgment, the meaning of the word “discretion,” as used by Arbitrator Snider, is something akin to this standard dictionary definition: “the freedom to act and think as one wishes (*it is within his discretion to leave*).”²⁵ As I have concluded that the nature of the discretion vested in the Company by the arbitrator’s cyber security policy essentially gave PNM the unilateral right to decide who would be subject to the policy’s requirements, I find that it had no obligation to provide the type of detailed information Fitzgerald sought at the time that he sought it. In that respect, I essentially agree with the assertion Oldham made in his February 16 email (Jt. Exh. 61, p. 2) that the Union’s information requests were designed to require the Company to justify the coverage selections it made. Arbitrator Snider’s decision obviates any need for the Company to provide such justifications. Accordingly, as I find PNM had no legal duty to honor the Union’s requests, I recommend dismissal of this allegation.

c. Complaint in Case 28–CA–23046

12. Paragraphs 8(a)–(c) alleges that PNM failed and refused to furnish Local 611 with five categories of requested information pertaining to the investigation of Union Steward Eric Cox’s conduct at the April 21, 2010 TeleStaff meeting.

Relevant facts. The facts related to the Cox’s conduct at the Telestaff meeting are fully described above in section C, pages 5–9. As set forth there, Carol Shay, PNM’s in-house labor counsel, supervised an investigation into Cox’s conduct at that meeting based on complaints of the managers and supervisor responsible for conducting the meeting.

On May 5, before the completion of the Shay’s investigation, Tafoya submitted a written request for information seeking the following information: (1) the names of everyone interviewed in the investigation of Union Steward Cox; (2) the list of allegations on which PNM based its investigation of Cox; (3) the names of the employees who made those allegations; (4) the interview notes of all employees who were interviewed; and (5) the investigation report that resulted. (Jt. Exh. 70.)

On May 18, the same day that Mathes notified Local 611 that no disciplinary action would be taken against Cox for his

²⁴ *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955); *Collyer Insulated Wire*, 192 NLRB 837 (1971).

²⁵ *Oxford Pocket American Dictionary of Current English*, Oxford University Press, 2002, p. 222.

conduct at TeleStaff meeting, PNM informed Local 611 that it would not provide the requested information as it was not relevant to any union function because no disciplinary action had been taken and because the documents sought were confidential. (Jt. Exh. 72.) Tafoya renewed the Union's information request on May 20 and PNM again denied the request on June 4 for the same reasons previously given plus the added ground that Tafoya's renewed request was now inappropriate because of the Local 611's May 19 unfair labor practice charge concerning the matter. (Jt. Exhs. 74 and 75.)

Argument and conclusions. The Acting General Counsel argues that each aspect of the Union's information request is presumptively relevant to assess whether or not to file a grievance because the Shay's investigation may have violated the provision of the collective-bargaining agreement that prohibits the Company "from discriminating against stewards for the faithful performance of their duties to over the Company's treatment of its steward." (Acting General Counsel Br., p. 75.) The Acting General Counsel argues further that the Cox investigation Shay conducted is indistinguishable from numerous other disciplinary investigations the Company routinely conducts. The Union makes additional arguments. It claims that PNM never made any attorney-client privilege or work product claim related to this request until the hearing. For that reason, the Union argues that the Company deprived it of the opportunity to modify its request by perhaps deleting its demands *for the production of PNM's interview notes or investigation report*. (CP Br., p. 61.)

The Company argues that it had no duty to furnish the requested information for these reasons: (1) the information was not relevant as Cox suffered no discipline from the Company's investigation and nothing in the collective-bargaining agreement governs or restricts the procedures that PNM uses to investigate employee misconduct; (2) the requested documents from PNM's investigation were protected work product; (3) PNM had no obligation to furnish the Union with the confidential interview summaries, interview notes, or the opinions or recommendations of its investigators generated during an internal investigation that Shay conducted; and (4) the Union's request amounted to an inappropriate attempt to obtain discovery in support of its pending NLRB charge.

I reject the Acting General Counsel's claim that Shay's work amounted to an ordinary disciplinary investigation. Rather, the focus of her inquiry sought to adduce facts for the purpose of determining whether a union steward had engaged in an unprotected disruption of an ordinary business meeting on April 21. In this context, I find that PNM had a reasonable basis to anticipate litigation in the event of a decision to discipline Cox's for his disruptive conduct. Indeed, it appears that aspects of the TeleStaff program were already pending before the NLRB even at the time the meeting occurred. Accordingly, I find the materials prepared during the Company's investigation under the direction of Shay constituted protected work product within the meaning of *Central Telephone*, 343 NLRB 987 (2004), and, for this reason, the Company had no obligation to provide the Union with the materials prepared by company representatives during the investigation Shay supervised.

Moreover, based on the nature of the misconduct engaged in by Cox (with Tafoya's eventual full support and endorsement) at the TeleStaff meeting itself together with the fact that the initial demand for information occurred in the middle stages of Shay's inquiry, I have concluded that the potential for harassment or retaliation that might result from the disclosure of the identify of any complaining employee or other witness sufficiently outweighs the Union's need for those names to a degree that would privilege the Company's refusal to provide such information on confidentiality grounds. *Northern Indiana Public Service Co.*, 347 NLRB 210, 211 (2006). This timing renders the Union's claim that it sought the requested information to evaluate a possible grievance challenging the Company's treatment of Cox highly suspect. Accordingly, I recommend dismissal of this allegation.

2. The unilateral change allegations

Settled law provides that an employer may not change the terms and conditions of employment of represented employees without providing their representative with prior notice and an opportunity to bargain over such changes. See *NLRB v. Katz*, 369 U.S. 736, 747 (1962). Put another way, *Katz* and its progeny bars an employer from unilaterally making material and substantial changes to the wages, hours, and other working conditions of union represented employees. This next group of allegations assert that the Company violated Section 8(a)(5) by ignoring this rudimentary labor law principle.²⁶

Consolidated Complaint in Cases 28-CA-22655
and 28-CA-22759

1. Complaint paragraphs 7(a), (h), and (g) allege that PNM violated Section 8(a)(5) by unilaterally implementing a new policy around June 17, 2009, "requiring employees to sign forms associated with the tailboard meetings."

Relevant facts. Prior to the start of any electrical project, the project leader, whether a supervisor, working foreman, or a journeyman electrician, must conduct a "tailboard" or "toolbox" conference with the crew members assigned. This policy is mandated by OSHA and has been in place at PNM for a number of years. It is embedded in the jointly negotiated employee safety manual at section I, subsection 3. (GC Exh. 7.) Subsection 3.1 provides that the tailboard conference shall include a discussion of the following: (a) the overall job and the end results expected; (b) the hazards that may be encountered and how to eliminate them; (c) work assignments; (d) the identification of any other crews that may be involved and how they will be involved; (e) the tools and safety devices that will be needed; and (f) assurances that each individual involved understands completely his assignment.

Over the years, OSHA has conducted a series of so-called partnership meetings with attended by representatives of industry associations, businesses engaged in the transmission and distribution of electricity, and the IBEW, Local 611's parent organization. No evidence shows that either PNM or Local 611 directly participated in these partnership conferences. One

²⁶ Not addressed in this section are the allegations made at complaint pars. 7(b), (h), and (g) as they have been addressed and decided at p. 28, above.

byproduct of the partnership meetings included the development and publication by OSHA of a “Best Practices” series, one of which included instructions on documenting the required tailboard meetings. (R. Exh. 4.) The OSHA Best Practice recommendation included a list of matters the tailboard meeting should cover and provided for a requirement that the “job briefing form shall have a provision for each employee to sign to verify they have participated in the job briefing.” (R. Exh. 5.).

In early 2009, PNM’s safety department developed a form for use at its tailboard meetings and a series of slides designed to provide instruction in completing the form. (Jt. Exhs. 23 and 101.) The form is largely a check list of matters that might be covered at the tailboard meeting. However, it also contains spaces at the bottom of the form for participating employees to sign and enter their employee number as “attendees.” Nothing in the attendee signature section or elsewhere appears to seek or constitute some type of binding verification of the safety manual requirement of an assurance by each of the employees present that they completely understand their assignment. There is no evidence that employees have been told of any potential discipline for failure to complete the form as a project leader, or for failing to sign the form as an attendee.

San Juan safety consultant Michael Walls said that Larry Goodman, the other senior safety consultant at San Juan, developed the form. The process, Walls said, involved consultations with “plant personnel to gain input and to consolidate multiple forms that were in use at the site into a single-use form.” (Tr. 1020.) When Goodman completed the form, he submitted it to the San Juan General Safety Committee (GSC) at their April 16, 2009 meeting. Following a discussion of the form and suggestions for changes, Walls, who was present at the meeting, said the committee chairman told Goodman “that he felt the form looked good, and he went on to say that it wasn’t the GSC’s position to approve or disapprove the form, since it’s not contained in the employee safety manual.” (Tr. 1021.) In the days following the meeting, Walls said that Goodman incorporated changes in the form suggested during the discussion at the GSC meeting and put it out for use.

Shortly after Goodman’s tailboard form was placed in use, a grievance was filed claiming that the Company unilaterally implemented the use of the form “as well as the requirement that it be signed.” It also charged that “these Safety Rules/Procedures have not been approved by the GSC.” After PNM denied the grievance at the first step, Fitzgerald appealed the matter to the next step (Jt. Exhs. 21 & 99.) seeking to have the use of the form rescinded and to stop PNM from requiring that employees sign it. Later, Fitzgerald submitted an information request concerning the form. Ginger Lynch responded on August 7, 2009, providing him with a copy of the form and the PowerPoint slides developed for its use. (Jt. Exh. 23.) Thereafter, on August 17 the Union filed another grievance concerning the use of the form and the requirement that it be signed by the employees. (Jt. Exh. 105.) In a letter dated January 10, 2010, PNM’s senior labor relations representative, Mick Oldham, insisted that the Union withdraw the grievance (Jt.

Exh. 102) in view of its pending NLRB charge²⁷ covering the subject but Fitzgerald refused to do so. (Jt. Exh. 103.)

Argument and conclusions. Citing the Board decision in *Brimar Corp.*, 334 NLRB 1035 (2001), the Acting General Counsel argues that the PNM’s unilateral implementation of the 2009 tailboard form together with the requirement that it be signed by employees violated Section 8(a)(5). The Charging Party advances the following shortcomings with the tailboard form advanced by Fitzgerald:

According to Fitzgerald, the Union’s problems with the form are: (1) it was unilaterally implemented since it was not approved by the GSC; (2) the instructions on filling it out bring more into the job briefing than in the Safety Manual; (3) the employees are required to sign the form; and (4) by having the person, even a journeyman, completing the form give the job briefing, and thus have a journeyman be in charge of another journeyman [Tr. 970–972].

(CP. Br., pp. 39–40.) Respondent argues that the issue should be deferred to arbitration under *Collyer*, supra. In addition, Respondent argues that the allegation should be dismissed as the change involved is not material or substantial.

In my judgment, the most reasonable inference one can make by comparing the allegation contained in the Union’s original charge with the allegation the Acting General Counsel eventually made in his complaint is that at some time during the pre-complaint consideration of this matter, a decision was made to attack only the requirement that employees sign the tailboard form. This conclusion is consistent with both the wording of the complaint allegation and the Acting General Counsel’s primary reliance on the *Brimar Corp.* case in his brief. Contrary to the argument advanced by the Charging Party in its brief, I find that the narrow issue presented by this complaint allegation is whether the Company violated Section 8(a)(5) by implementing a requirement that employees sign the tailboard form it placed in use in April or May 2009.²⁸ And due to the vast degree of difference between the narrow complaint allegation compared to the Union’s grievances, I find a *Collyer* deferral unnecessary and inappropriate.

This allegation lacks merit as the so-called change involved is neither material nor significant. The employee signature

²⁷ The unfair labor practice charge covering this subject was filed by the Union’s counsel on October 28, 2009, in Case 28–CA–22759. It alleged that the Company unilaterally changed its “safety rules, regulations, policies and procedures.”

²⁸ To the degree that the Acting General Counsel’s brief encompasses some of the Charging Party’s much broader theories, then serious evidentiary issues arise. For example, Fitzgerald’s claim that the tailboard form had to be approved by the safety committee is clearly inconsistent with Michael Walls’ reliable report of a contrary claim by the safety committee chairman. Further, the Charging Party’s position implicates numerous questions about the past practice of journeymen conducting at least some of the tailboard meetings. The record contains little, if any, related evidence. One can reasonably assume that the Acting General Counsel’s office considered such questions when framing the scope of this complaint allegation and planning its hearing presentation particularly where, as here, the Acting General Counsel utilized 611(c) witnesses for the bulk of his case.

required here amounts to little more than an attendance sign-in sheet for a routine work meeting. The requirement in *Brimar* was far different. There the Board found that the employee's signature on the form presented to them constituted an acknowledgment of what was expected of them in terms of production and that by signing the form the employee could be held accountable. 334 NLRB 1035. Here, PNM employees have always been required to participate in tailboard meetings; they are not optional as they are largely conducted for the benefit and safety of employees. Even assuming that the tailboard form contained some type of acknowledgment regarding the substance of the meeting, which it does not, the safety manual would appear to provide the latitude for even that because it requires the worker's assurance that he/she understands their assignment. As I have concluded that the employee signature requirement here is neither significant nor material, I recommend dismissal of this allegation.

2. Complaint paragraphs 7(c), (h), and (g) allege, in effect, that since about August 2009, Respondent unilaterally implemented a new policy limiting access to its ESC premises in Albuquerque by Local 611 agents.

Relevant facts. The parties make no claim that any specific provision in their collective-bargaining agreement addresses access to the Company's private property by Local 611 representatives. However, there is ample evidence of a 30-year accommodation between the parties that permitted Local 611 representatives access to the ESC for the purpose of meeting with employees during nonworktimes, attending grievance and bargaining sessions, and speaking with supervisors and managers when needed. Through this long accommodation period virtually no physical barriers to the ESC parking lots and buildings existed. In fact, the ESC was so open that angry customers occasionally came to confront workers and thefts of materials stored there regularly occurred.

In 2008, the Company undertook to establish more limits on access to the ESC facility. Line Department Manager Jeff Nawman oversaw this process. In the initial phase, the Company made capital improvements that included the installation of a fence, more access gates, added security cameras, and the like. During this period, Nawman requested that Ed Tafoya, the Local 611 agent primarily responsible for contract administration at the ESC and, hence, the union representative most frequently at that facility, to park in the visitors lot rather than the employee lot as had been his practice and Tafoya agreed.

In the next phase, the Company installed electronic locks on various gates and doors that required a coded card for access and compiled a written access policy. In December 2008, Nawman provided Tafoya with a draft of the new access policy and asked for his comments. Tafoya complained about some of the new parking policies and obtained Nawman's assurance that the provision for the tire-booting of employee autos would not be enforced. Tafoya also inquired about his own access under the new policy. In response, Nawman arranged for Tafoya to be provided with "Contractor's Level 2 badge" that in effect gave him the means to access the ESC between 6 a.m. and 6 p.m. The draft of the access policy (Jt. Exh. 24) submitted to Tafoya provided that contractor badges would be effective for 6-month periods but Nawman never discussed this limi-

tation with Tafoya when arranging for the issuance of his badge.

In mid-January 2009, the Company placed its new access policy in effect. No evidence shows any complaints by Local 611 about the Nawman/Tafoya arrangement between January and August 2009. During that period, Tafoya's access largely approximated the access that he had always been given prior to the installation of the new equipment and policies. However, when his badge ceased to work in early August, Tafoya spoke to Crista Belt asking for her to remedy the problem. Tafoya asserted to Belt that his badge had been issued by Nawman "to allow the Company to install its new security measures without objection." (GC Exh. 17.)

A series of email exchanges took place within the Company's upper echelon (GC Exh. 16) concerning the renewal of Tafoya's badge that ultimately resulted in the approval of the following message Belt sent to Tafoya on August 14:²⁹

Since the transition to the new access system is now complete, and given that you are not a contractor, the Company has determined that it is more appropriate for you to have "visitor" access instead of the "contractor" access. You will have the same access as all other non-contractor vendors and retirees who are not currently employed at PNM. We are not aware of any limitations this would create in the performance of your Union Business Agent duties to represent the bargaining unit employees. Please contact myself or Ray Mathes if you experience any difficulties with this.

(Jt. Exh. 25.)

The January 2009 access policy provides as follows with respect to visitors:

Visitors: All visitors will be required to sign in with Security or at the front desk of the Administration Building. Visitor's badges or stickers will be issued to visitors by Security or by an ESC employee. Employees will be required to escort visitors at all times within the ESC compound. Visitors can be pre-announced to Security by calling 241-3642 and Security will provide notification when the visitor has arrived. Employees will be required to pick up and return visitors at either the main service gate (E-4) or the front lobby of the Administration Building. Visitor badges should be returned to Security at the end of the visit.

(Jt. Exh. 24.)

Since August 14, Company officials have refused repeated requests that the original access arrangement Nawman made with Tafoya be restored.

Argument and conclusions. The Acting General Counsel and the Charging Party argue that Belt's August 14 message and the subsequent refusal to restore the terms of Tafoya's access amounts to an unlawful unilateral change in the past practice regarding access to the ESC by union agents. This

²⁹ These email exchanges produced pursuant to the Acting General Counsel's subpoena surprisingly contain no reference whatever of Tafoya's conduct that disrupted the April 2009 TeleStaff meeting. Likewise, Respondent's brief advances no argument that the TeleStaff incident motivated Respondent's action upon Tafoya's request that the Company renew his contractor's badge.

change, the Acting General Counsel argues, is material and significant inasmuch as it substantially restricted the access Tafoya had with the unit employees when compared to the access he had historically and under the arrangement established with Nawman. Respondent contends that the evidence fails to support a finding of a past practice regarding access to its private property and even if it does, no material or significant change occurred in August.

I did not agree with Respondent's claim. An employer is not at liberty to unilaterally alter an established past practice allowing access to its premises by an employee representative for the purpose of performing representative functions even where that access is not specifically incorporated in the collective-bargaining agreement. *Granite City Steel Co.*, 167 NLRB 310, 312-313 (1967). Here, the evidence shows a longstanding practice of granting union agents access to PNM's private property for the purpose of providing service to the employees the Union represents. Nawman, a PNM manager with a long tenure at the ESC, admitted as much. Moreover, his conduct prior to the implementation of the access policy in January plainly recognized that fact and the arrangement he made with Tafoya for issuance of a Contractor's Level 2 badge amounted to a binding agreement between the Company and the Union concerning the method for future access under the new policy.

The visitor-pass arrangement Company officials imposed in August restricts the hours of access to a greater degree than the Contractor's Level 2 badge and, unlike the contractor's pass, it requires a continuous escort. The hours of access under a visitor's pass virtually eliminates the union agent's access to employees before and after their work hours. The escort aspect of a visitor's pass, in particular, would clearly inhibit the kind of candid exchanges possible between the represented employees and their union agents. Accordingly, the change made in August is material and significant. *Ernst Home Centers*, 308 NLRB 848, 849 (1992). For these reasons, I find that the Company's unilateral alteration of Tafoya's ESC access arrangement in August 2009 when it refused to renew his Contractor's Level 2 badge without the Union's consent or an impasse in negotiations concerning his access to that facility violated Section 8(a)(5) as alleged.

3. Complaint paragraphs 7(d), (h), and (g) alleges that in late October 2009, PNM violated Section 8(a)(5) when it issued cell phones to unit employees and promulgated new rules regarding their maintenance and use without providing Local 611 prior notice and an opportunity to bargain about this subject.

Relevant facts. This issue pertains to the details of the physical means for contacting the on-call journeymen in the line department of PNM's Santa Fe division and to communicate with on-duty linemen in certain remote areas. For about 10 years, pagers or cell phones have been used to supplement the spotty radio communications that can occur in the mountainous portions of the Santa Fe division. During that time, PNM maintained a lengthy written policy, the PCD policy, covering the use of Company cell phones and personal cell phones used for conducting PNM business. The latest revision of the PCD that issued in February 2008 continued a prior arrangement whereby supervisors could authorize a reimbursement

of up to \$40 per month for on-call linemen who opted to use their personal cell phones instead of a company phone.

In January 2009, the Company altered this Santa Fe arrangement by issuing cell phones from a company equipment pool to all on-call employees thereby obviating the need to reimburse employee for the use of their personal cell phone. This change resulted in the filing of several grievances. One (R. Exh. 2), filed by lineman Dennis Tapia, complained about the failure to provide a phone from the Company's cell phone pool due to the lag time between the end of an employee's on-call status and the return of the assigned phone to the pool so it could be issued to the next on-call lineman. Another (R. Exh. 3) filed by Union Steward Cale Chappelle,³⁰ charged that the Company unilaterally discontinued reimbursements for the use of personal cell phones. Labor Relations Representative Crista Belt credibly testified that Chappelle, who acknowledged he had numerous exchanges about this subject with the then Santa Fe Division Manager Armand Alessandrone throughout this period (Tr. 886), told her in late September that the Union wanted the PNM to provide cell phones or restore the reimbursements to employees in order to resolve the pending grievances.³¹ (Tr. 454-455.)

By October 2009, the issue addressed in Tapia's grievance became so problematic that PNM began issuing cell phones to all Santa Fe linemen.³² Alessandrone announced this arrangement in an October 27 letter to Chappelle with a copy to Tafoya. It stated:

Earlier this year, we went to a "pool" approach for cell phones in the Santa Fe Line department. However, since then we have reviewed this approach and determined the cost savings and efficiency is not significant at this time. Therefore, please be advised of our intent to issue cell phones for Company business only, to each individual Santa Fe Journeyman within the next 30 days. Employees will be responsible to properly maintain, charge, and have the phones in their possession during all assigned work hours. There will not be any reimbursement of personal cell phones for Company business.

(Jt. Exh. 42.) He personally presented this letter to Chappelle in a meeting also attended by Tafoya and Sonia Otero, a company human resources representative. By the time he received the letter, Chappelle said, "[T]here was not a whole lot that really could be said . . . (because this) was pretty much the culmination of the whole year of chaos." (Tr. 888.)

Later, however, Chappelle complained to Alessandrone about the lack of an option in his October letter that permitted linemen use personal phones with a company reimbursement, as well as the requirements that employees were responsible for

³⁰ By the time of these events, Chappelle had been a steward in the Santa Fe line department for 10 years.

³¹ In addition, Belt claims that Chappelle also requested authorized overtime work for a particular employee. The relationship of this particular demand to the cell phone grievances was never clearly explained.

³² Aside from the lag time problem, Chappelle said that the phones came without auxiliary equipment such as chargers or spare batteries so that the phones would occasionally go dead even when they arrived in the correct hands.

keeping the phones charged and with them at all times. Chappelle also complained to Allensandrone that his letter made no provision for the using the Company's phone for minimal personal use in accord with the Company's existing policy. (Tr. 888-889.)

On October 28, 2009, Local 611's counsel filed the NLRB charge in Case 28-CA-22759 underlying the cell phone allegation made in this complaint. The allegation in that charge on the subject of cell phones claimed that the Company "made unilateral changes in . . . the use of personal cell phones as well as mandating the use of Company-owned cell phones in the Santa Fe Line Department."

Argument and Conclusions. The Acting General Counsel argues that Manger Allensandrone failed to give the Union any opportunity to bargain when he promulgated the various changes that are set forth in this October 27 letter to Chappelle, namely, (1) requiring linemen to carry cell phones at all times while working; and (2) subjecting employees to discipline under existing company policies for not maintaining, charging, and carrying their company cell phones. The Charging Party argues Allensandrone's letter unilaterally "denied any reimbursement (for the option of using personal cell phones) as well as any use of the company phones for personal business."

Respondent argues that any claim concerning the discontinuance of the reimbursement policy for use of personal cell phone is barred by the 10(b) statute of limitations because that change occurred in January 2009 and the cell phone charge was not filed until the end of October. Moreover, the Company argues that Allensandrone's October letter did not "implement any new policy or rule at all. Regardless, Respondent argues that any claimed "unilateral change," such as the requirement that a company-issued cell phone be charged and useable or that it be carried at all times, is not material and significant.

I find this allegation lacks merit. A conclusion that the Company did anything "unilaterally" in connection with this subject would be a perverse misuse of the word by anyone who, like I, observed and listened to Chappelle describe what occurred here. His entire manner and tone left me with the unmistakable impression that he had endless discussions with Allensandrone regarding a solution to this routine workplace problem. Given the time span involved, and the lack of evidence about any significant involvement by higher level Local 611 officials, leads me to conclude that Chappelle served as the Union's point man on this subject. For this reason, I have relied on primarily on his words and conduct in this situation.

I reject the Union's contention that PNM violated the Act by discontinuing the policy of reimbursing employees the use of their personal cell phones because that claim is timebarred. Chappelle's second step grievance dated February 2 confirms that this action occurred no later than that date which is just short of 9 months before the filing of the first charge related to the cell phone issue. In addition, this claim by the Union's appears to be inconsistent with any theory advanced by the Acting General Counsel about cell phones.

In addition, I have concluded that the Acting General Counsel's arguments fail account for the historical context of Allensandrone's October letter. The Acting General Counsel's claim that Allensandrone unilaterally changed an existing policy by

requiring linemen to carry cell phones either incorrectly assumes that had not been the prior practice or that he, in effect changed the rules in the employee safety manual. I find his October letter is not susceptible of either interpretation.

Chappelle's testimony makes clear that the cell phone dispute related not only to management's ability to contact on-call employees as the Acting General Counsel assumes, but also to its ability to reach on-duty employees throughout the geographical area served by the Santa Fe Division. The added claim by the Acting General Counsel Allensandrone established new rules of some sort requiring employees to keep their cell phones charged and otherwise maintained, whether they used their own or the Company's, is factually undermined by Chappelle's complaints the frequency with which the pool phones were unaccompanied by chargers or spare batteries. And the claim that Allensandrone's October letter changed existing safety rules lacks merit as nothing in his letter is reasonably susceptible to an interpretation that employees had to have phones available on their person in situations previously deemed unsafe under ordinary safety procedures. For these reasons, I have concluded that all of these assertions are little more than the fruit of Local 611's inventive imagination. I recommend dismissal of this allegation.

4. Complaint paragraphs 7(e), (f), (h), and (g). Complaint paragraph 7(e) alleges that since about March 26, 2009, PNM "has failed and refused to consider and recognize employees who hold the job title of Operations Representative and perform electrical meter reader and collector work as being employed within the Electrical Unit." The closely related complaint paragraph 7(f) alleges that since July 20, 2009, PNM has refused to process a grievance filed by the Union seeking to require that PNM properly classify James Martinez and similarly-situated employees and place them in the electrical unit.

Relevant facts. Prior to 2008, the Union did not represent PNM's meter readers or collectors, the MRC employees, or its employees who worked on the gas side of its operations. In early 2008, the Union filed two representation petitions with the NLRB. One petition sought an election in a unit MRC employees and the other sought an election in a unit of employees working in the gas operations. The unit sought by the Union in the gas operations included employees the Company classified as "operations representatives." The Union did not seek to represent this classification, or its generic cousin, in the MRC unit. The subsequent elections were conducted by the Regional Director pursuant to the parties' stipulated election agreements. The Union ultimately won both elections by margins wide enough to make it unnecessary to consider any of the challenged ballots. In January 2009, PNM divested itself of its gas operations.

Following the MRC election, the Regional Director certified Local 611 on May 8, 2008, as the exclusive representative of the employees in the following stipulated unit:

All meter readers, who regularly read only electric meters or both electric and gas meters, and all collectors employed by the Employer in the State of New Mexico; excluding all meter readers who regularly read only gas meters, all employees currently represented in any existing bargaining unit, all ad-

ministrative, production, maintenance, construction, and managerial employees, office employees who do not regularly work in the field, office clerical employees, guards, and supervisors as defined in the Act.

(Jt. Exh. 29; see also Jt. Exh. 111, the stipulated election agreement.) There is little if any evidence as to what occurred between the time of this certification and the conclusion of the negotiations for a new collective-bargaining agreement that became effective on May 1, 2009. However, that unit set forth in that agreement merits the inference that the parties effectively merged the newly certified MRC unit into the historical unit represented by Local 611. (GC Exh. 5., art. 3B, p. 3.)

James Martinez, a self-described meter reader who has worked for PNM at its Las Vegas, New Mexico office for 10 years, is classified as an operations representative. The Las Vegas office operates under the direction of PNM's divisional office in Santa Fe, some 70 driving miles to the west. The six other employees work at that office include two cashiers, three line department workers, and a designer who works at that location 2 days a week. There are no other workers in the Las Vegas area engaged in meter reader work.

Martinez' work duties consist of performing the scheduled electrical meter reading around Las Vegas, delivering 2-day service cancellation notices, hand-delivering PNM bills to the city of Las Vegas and the area schools pursuant to an special arrangement with those public entities, and maintaining the company truck he uses for his work. (Tr. 352.) Although PNM has never had any gas operations in the Las Vegas area, and Martinez has never worked for PNM in any of its gas operations elsewhere, his name appeared on the *Excelsior* list for the 2008 election in the gas unit. PNM challenged the ballot cast by Martinez on the ground that he was not employed in the gas operation. (GC Exh. 21.) In addition, the Regional Director sent a ballot to Martinez in the MRC election but he did not return that ballot. (GC Exh. 20.)

The job descriptions for operations representative I and II (GC Exhs. 10 and 11) lists meter reading as one of several, wide-ranging functions an incumbent is expected to perform. The meter reader and senior meter reader job descriptions (Jt. Exh. 52) focus more narrowly on a variety of tasks connected with the meter reading function than is found in the description for the operations representative.

On May 20, 2009, Union Agents Tafoya and Fitzgerald met with Frank Storey, PNM's manager of meter readers and collectors, and Belt to discuss the Martinez situation. They requested that he be reclassified in the unit as a senior meter reader. On May 22, the Union filed a grievance complaining that the Company failed to do so. Thereafter, the Company offered to settle the Martinez matter by classifying him as a meter reader but it refuses to classify him as a senior meter reader on the ground that he does not perform significant senior meter duties.³³ Hence, this extraordinarily ordinary matter remains stalemated.

However, the Company also refuses to recognize the Martinez grievance. In a July 20 email to Tafoya, Belt advised that the "Martinez matter does not meet the definition of a grievance under Article 10 of the CBA." Article 10 defines a grievance as "limited to a dispute between the parties hereto with respect to the interpretation or application of the provisions of this Agreement or the application of a specific policy to a specific employee." (GC Exh. 5, p. 10, emphasis added.)

Argument and conclusions. As to complaint paragraph 7(e), the Acting General Counsel's brief argues that I should conclude on the basis of the Board's analytical model articulated in *Caesar's Tahoe*, 337 NLRB 1096 (2002), and its progeny, that Martinez belongs in the MRC unit, and that Respondent violated Section 8(a)(5) by its refusal to include Martinez in the MRC unit. The brief cites *Public Service Co. of New Mexico*, 337 NLRB 193 (2001) (the prior PNM case) to support this theory of a violation. Local 611 also argues that PNM has effectively changed the certified unit by its refusal to include Martinez in the unit on the ground that he is an operations representative and cites *Grosvenor Resort*, 336 NLRB 613 (2001), as precedent for their conclusion. Respondent, citing *Verizon*, 350 NLRB 542 (2007), argues that no violation should be found as to this allegation because it has a "sound arguable basis" for its position regarding the application of the contract in the Martinez matter.

I find merit in Respondent's argument. In my judgment, it would be inappropriate at this late date and in the context of a refusal to bargain unfair labor practice case to determine on the basis of a *Caesar's Tahoe* analysis that Martinez has always been in the MRC unit. In my judgment, finding PNM's current refusal to treat him as a part of the MRC unit as tantamount to a unilateral change in the unit scope would not be appropriate. *Grosvenor Resort* and the prior PNM case on which the Acting General Counsel relies are factually distinguishable.

The evidence in this record merits the inference and conclusion that Martinez and a few others were originally excluded from the MRC unit at the time of the NLRB election largely by mistake. *Grosvenor Resort*, the prior PNM case and others like them, involve situations where an employer took affirmative, unilateral action to remove categories of historically represented employees from a bargaining unit. Those cases implicate the principle that a party may not press a unit scope issue to the point of impasse because it is a permissive, rather than a mandatory, subject of bargaining.

Here, parties have resolved this problem as to all affected employees other than Martinez. There is little indication that they have any serious disagreement about his eventual inclusion in the represented unit. Instead, they simply cannot come to an agreement about a proper meter reader job classification for Martinez. Local 611 demands that he be classified as a collector or a senior meter reader; PNM refuses to give in on its argument that Martinez' work duties qualify him for no more than a meter reader 12+ classification.

³³ The Company claims that Martinez does not perform important senior meter reader duties such as serving as coordinator's backup or providing functional leadership to other meter readers. Martinez earned \$15.21 per hour at the time of the hearing. The contractual hourly rate

for meter readers with over 12 months of experience was \$15.50. The senior meter reader hourly rates ranged from \$16.25 to \$18. GC Exh. 5, p. 82.

I find no merit to the Acting General Counsel's argument regarding complaint allegation 7(e) that Respondent violated Section 8(a)(5) by its failure to include operations representatives in the MRC unit at Local 611's request if an employee so classified engaged in any meter reading.³⁴ As Respondent correctly notes, the job descriptions in evidence establish that one of the several duties of the operations representatives historically included at least some meter reading work. As that situation existed at the time of the election, any effort to now sweep the operations representatives into the merged unit because of the meter reading responsibilities of this group, whatever and however much they are, would appear to raise a question concerning representation. For these reasons, I recommend dismissal of complaint paragraph 7(e).

As for complaint paragraph 7(f), counsel for the Acting General Counsel argues that PNM's refusal to process the grievance related to Martinez' situation violates Section 8(a)(5). Local 611 argues that PNM's conduct in connection with Martinez and similarly situated employees amounts to a "bad-faith refusal to bargain and an insistence that PNM can determine the scope of the certified and agreed-upon unit simply by what job title it gives them." Respondent argues that the Union could not properly file a grievance related to Martinez because he does not belong to the bargaining unit and is not represented by the Union. In effect, Respondent stands by Belt's July 20 email (Jt. Exh. 32) for its defense to this allegation.

PNM's refusal to process the Martinez grievance on the ground that he does not have access to the grievance procedure begs the question. Local 611 has access to the grievance procedure because it is one of the "parties" to the agreement seeking the resolution of a dispute "with respect to the interpretation or application of the provisions" as provided in the contractual grievance definition. In the case of Martinez, the Union's concern has at least a degree of legitimacy as Martinez spends nearly all of his time engaged in meter reading or closely related work. For this reason alone, the Union would arguably have a substantial interest, entirely apart from Martinez, in resolving the situation at Las Vegas due to its exclusive representative status as to the MRC unit and the legal duties that status entails.

Usually the courts refuse to find a grievance is not arbitrable unless it can be "said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-583 (1960). This same principle would apply to a situation involving a party that refuses to process a grievance from the outset. For this reason, I find Respondent's defense is not sufficient to foreclose an 8(a)(5) finding for its refusal to participate in the grievance procedure in order to resolve the May 22 grievance the Union filed concerning Martinez.

But that does not appear to be the end of the matter. Counsel for the Acting General Counsel relies on *Contract Carriers Corp.*, 339 NLRB 851, 852 (2003), in support of the contention

that Respondent violated Section 8(a)(5) by refusing to process the Martinez grievance. I find that case factually distinguishable from the situation here. The facts in *Contract Carriers* show that an employer group refused to participate in numerous bilateral meetings necessary under the contractual grievance procedure to process and resolve grievances. Here, Respondent has refused to process only a single grievance, i.e., that involving the Martinez situation.

The Board has held that an employer's refusal to arbitrate a single grievance does not always rise to the level of an unfair labor practice. *Velan Valve Corp.*, 316 NLRB 1273 (1995). The Board summarized the governing principles in such situations as follows:

It is well settled that not every employer refusal to arbitrate violates Section 8(a)(5). *Mid-American Milling Co.*, 282 NLRB 926 (1987). Where there is a refusal to arbitrate all grievances, or where the refusal to arbitrate a particular class of grievances amounts to a wholesale repudiation of the contract, a violation will be found. See *Indiana & Michigan Electric Co.*, 284 NLRB 53 (1987). Conversely, if the refusal to arbitrate is limited to a single grievance or specifically defined, "narrow class" of grievances, Section 8(a)(5) is not violated. *GAF Corp.*, 265 NLRB 1361, 1365 (1982); *Mid-American Milling Co.*, supra. The relevant inquiry in determining whether an employer's refusal to arbitrate violates the Act is whether the employer, by its refusal, has thereby unilaterally modified terms and conditions of employment during the contract term. *Southwestern Electric*, 274 NLRB 922, 926 (1985).

316 NLRB at 1274. Footnote omitted; emphasis added. Subsequently, the Board cast the *Velan Valve* rule in this slightly different language: "An employer's refusal to arbitrate grievances, pursuant to a collective-bargaining agreement, violates Section 8(a)(5) of the Act if the employer's conduct amounts to a unilateral modification or wholesale repudiation of the collective-bargaining agreement." *ACS, LLC*, 345 NLRB 1080, 1081 (2005).

I find the *Velan Valve* rule controls complaint paragraph 7(f). Although I have found other violations in this consolidated proceeding, the evidence shows that the Martinez matter is sufficiently discrete and isolated as to preclude a finding that PNM's failure to process this single grievance amounts to a "unilateral modification or wholesale repudiation of the collective-bargaining agreement." Therefore, I recommend dismissal of complaint paragraph 7(f).

CONCLUSIONS OF LAW

1. Respondent Public Service Company of New Mexico is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 611 is a labor organization within the meaning of Section 2(5) of the Act that serves as the exclusive collective-bargaining representative of the following appropriate unit of employees within the meaning of Section 9(a) of the Act:

All employees of the Respondent's Electric, Water, Transmission, Distribution, Production, Meter Reader, and Collector departments in the divisions and jobs referenced in Respond-

³⁴ The unit clarification process described in Sec. 101.17 of the Board's Statement of Procedures ordinarily would serve as a mechanism to resolve this type of dispute but that process would not resolve the Martinez reclassification dispute at the core of this matter.

ent's collective-bargaining agreement with the Union effective by its terms from May 1, 2009, through April 30, 2012.

3. By failing to provide Local 611 with the following relevant information it requested: (a) about accidents occurring at the San Juan Station involving an asbestos exposure; (b) that sought in items 4, 5, and 7 of the request for information related to grievance SJ-08-15; (c) the unredacted copies of the discharge recommendations prepared by Ginger Lynch in connection with the termination of employees Guy Claw and Everand Silas; and (d) a list of the "other duties" performed by individuals classified as coordinators, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

4. By unilaterally changing the requirement for Local 611 representatives to access its ESC facility in Albuquerque, New Mexico, in August 2009, Respondent violated Section 8(a)(1) and (5) of the Act.

5. Respondent did not engage in any other of the unfair labor practices alleged this consolidated proceeding.

6. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, my recommended order requires them to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Affirmatively Respondent must forthwith furnish the information necessary and relevant to the performance of Local 611's duties as the exclusive collective bargaining representative of Respondent's employees that it unlawfully withheld. Furthermore, Respondent must restore the ability of Local 611 agents to access its ESC facility in Albuquerque, New Mexico, as it existed from January until August 2009. In the event Respondent has altered its access procedures in the meantime, it will be required to provide Local 611 representatives with a form of access substantially equivalent that which existed from January until August 2009 until it negotiates alternate access procedures applicable to representatives of Local 611 or reaches a lawful impasse attempting to do so.

Respondent will also be required to post the notice attached as Appendix A in order to inform employees of the outcome of this matter.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁵

ORDER

The Respondent, Public Service Company of New Mexico, State of Mexico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local 611 as the exclusive representative of the employees in the following appropriate unit:

All employees of the Respondent's Electric, Water, Transmission, Distribution, Production, Meter Reader, and Collector departments in the divisions and jobs referenced in Respondent's collective-bargaining agreement with the Union effective by its terms from May 1, 2009, through April 30, 2012.

(b) Refusing to provide Local 611 with the information it requests that is necessary and relevant to the performance of its duties as the exclusive collective-bargaining representative of the employees in the above unit.

(c) Changing past practices that affect the terms and conditions of employment of its employees in the above unit without the prior consent of Local 611 or a lawful impasse in negotiations over any proposed change.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of this Order, provide Local 611 with the following information necessary and relevant to the performance of its representative functions: (1) the relevant information requested concerning accident reports that involve an asbestos exposure; (2) the relevant information pertaining grievance SJ-08-15 that it declined to provide on August 14, 2009; and (3) unredacted copies of the discharge recommendations prepared by Ginger Lynch in connection with the termination of employees Guy Claw and Everand Silas; and (4) the relevant information it requested about the other duties performed by persons classified as coordinators.

(b) Within 14 days of this Order, restore the access Local 611 agents had to its Electric Service Center facility in Albuquerque, New Mexico, to that which existed from January until August 2009, or in the event Respondent has generally altered its access procedures, provide Local 611 agents with a form of access substantially equivalent that which existed between January and August 2009.

(c) Within 14 days after service by the Region, post at its facilities located in the State of New Mexico, copies of the attached notice marked "Appendix."³⁶ Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered,

³⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

³⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed a facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees of Respondent at any time since March 31, 2009.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply with this Order.

IT IS FURTHER ORDERED that the consolidated complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., February 17, 2012.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with Local 611 as the exclusive representative of our employees in the following appropriate unit:

All employees of the Respondent's Electric, Water, Transmission, Distribution, Production, Meter Reader, and Collector departments in the divisions and jobs referenced in Respondent's collective-bargaining agreement with the Union effective by its terms from May 1, 2009, through April 30, 2012.

WE WILL NOT refuse to provide Local 611 with the information it requests that is necessary and relevant to the performance of its duties as the exclusive collective-bargaining representative of the employees in the above unit.

WE WILL NOT change past practices that affect the terms and conditions of employment of our employees in the above unit without the prior consent of Local 611 or a lawful impasse in negotiations over any proposed change.

WE WILL NOT in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL provide Local 611 with the following information it previously requested: (1) accident reports that involve an asbestos exposure at the San Juan Station; (2) items 4, 5, and 7 of Local 611's request for information concerning grievance SJ-08-15 that we declined to provide on August 14, 2009; (3) unredacted copies of the discharge recommendations prepared in connection with the termination of employees Guy Claw and Everand Silas; and (4) a list of the other duties performed by employees classified as coordinators.

WE WILL restore the access Local 611 agents had to our Electric Service Center facility in Albuquerque, New Mexico, to that which existed from January until August 2009.

PUBLIC SERVICE COMPANY OF NEW MEXICO